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OF THE

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TABLE

OF

CASES REPORTED

	Page
Abrams, McClure v.	51
Abrams' Estate, In re	51
Adams v. Hines	672
American Savings Bank & Trust Company v. Lawrence	198
Anderson v. McLaren	33
Anderson v. Pantages Theatre Company	24
Anderson's Estate, In re	591
Arctic Company, Worthy v.	435
Bach, Le Marinel v.	651
Barry, Bayers v.	252
Barry, Levine v.	623
Barton v. Seattle	331
Baumgartner, Crowley v.	193
Bayers v. Barry	252
Beck v. Boucher	574
Benson, Parrott & Company v.	117
Benthien, Malim v.	533
Benton County, Whiteside v.	463
Betcher, Larsen v.	247
Bishop, In re	245
Boucher, Beck v.	574
Boulton v. Seattle	234
Boyd v. North	540
Brinker, State ex rel. Brown v.	47
Brown, State v.	699
Bruhn & Henry, Henry v.	180
Buckley v. Harkens	468

Page
Burbank Company, Michaud v. 205
Burk, State v. 370

Caldbick v. Marysville Water & Power Company. 562
Capps v. Western Talc Company. 94
Carney v. Carney. 268
Carstens v. Powles & Company. 588
C. D. & E. Investment Company, French v. 416
Citizens' Realty Company, Thomas v. 456
Clark, Cramer v. 126
Clausen, State ex rel. Ronald v. 520
Coad, Guaranty Security Company v. 156
Cochran v. Cochran. 499
Congdon, Joyce v. 239
Cooley v. Davis. 196
Craib & Company, Wagner Company v. 139
Cramer v. Clark. 126
Crowley v. Baumgartner. 193

Daniel v. Reid. 211
Danielson v. Libby, McNeill & Libby. 340
Dart v. McDonald. 448
Dart, McDonald v. 448
Davis, Cooley v. 196
Demas, State v. 596
DeMuth v. Kleeb. 607
Deshler, State ex rel. Deshler v. 507
Ditz, Vachon v. 11

Ely, State v. 185
Ericson v. Ericson. 485
Eureka Cedar Lumber & Shingle Company,
Northup-Hage Lumber Company v. 669

Fairbanks, Teweles Seed Company v. 321
Fairfield, State v. 699
Fenton v. Poston. 217

Page
Ferling v. Hines 433
Fidelity Abstract and Title Company, Murphy v.. 77
Foss' Estate, In re 681
French v. C. D. & E. Investment Company 416

Gannon v. Jensen 701
Gazzam, Kuwabara v 75
Gazzam v. Young 66
G. G. No-Skid'm Tire Belt Company, Robeson v.. 98
Gibson, Mayer v 394
Gill v. Parry 19
Goulette v. Goulette 689
Grady, Spokane v 700
Grady, State ex rel. Lindsley v 692
Guaranty Security Company v. Coad 156

Harkens, Buckley v 468
Hennessy, State v 351
Henry v. Bruhn & Henry 180
Hill v. Walville Lumber Company 476
Hines, Adams v 672
Hines, Ferling v 433
Hitt Fireworks Company v. Scandinavian American Bank 167
Hosner v. McDonnell 489
Hoven, Northern Pacific Railway Company v 130
Hoyle, State v 290
Hutchins v. School District No. 81 of Spokane County 548

Industrial Insurance Department, Klippert v 525
Inland Empire Railroad Company, Smith v 441
In re Abrams' Estate 51
In re Anderson's Estate 591
In re Bishop 245
In re Foss' Estate 681
In re Johnson's Estate 61
In re Phinney Avenue 262

Page
Jammie v. Robinson 275
Jensen, Gannon v 701
Jensen, State v 401
Jensen Company, Walla Walla v 134
Johnson v. Smith 311
Johnson, Yost v 61
Johnson's Estate, In re 61
Jones, State v 144
Joyce v. Congdon 239

Kaufman v. Perkins 40
Kelch, State v 601
Kies v. Wilkinson 89
Kleeb, DeMuth v 607
Klippert v. Industrial Insurance Department 525
Kuwabara v. Gazzam 75

Larsen v. Betcher 247
Latour Creek Railroad Company, Skoug v 516
Lawrence, American Savings Bank & Trust Company v 198
LeDoux v. Seattle North Pacific Shipbuilding Company 632
Le Marinel v. Bach 651
Levine v. Barry 623
Levy, Simon v 556
Libby, McNeill & Libby, Danielson v 340
Linn v. Reid 609
Litchman v. Pacific Telephone and Telegraph Company 149
Lochridge v. Natsuhara 326
Longmire v. Yelm Irrigation District 619

McChesney, State v 113, 208
McClure v. Abrams 51
McDermott, State v 123
McDonald v. Dart 448
McDonald, Dart v 448

Page
McDonald, State v. 696
McDonnell, Hosner v. 489
McLaren, Anderson v. 33
Malim v. Benthien. 533
Manfredi, Salzer v. 666
Marysville Water & Power Company, Caldbick v. 562
Mayer v. Gibson. 394
Michaud v. Burbank Company. 205
Mitsui & Company, Sussman v. 294
Morris, State ex rel. Annette v. 700
Muller, State v. 660
Murphy v. Fidelity Abstract and Title Company. . 77

Natsuhara, Lochridge v. 326
Neary v. Puget Sound Engineering Company. . . . 1
Norman, Shelley v. 381
North, Boyd v. 540
North Coast Power Company v. Public Service Commission 102
Northern Pacific Railway Company v. Hoven. . . . 130
Northern Pacific Railway Company v. Walla Walla 153
Northup-Hage Lumber Company v. Eureka Cedar Lumber & Shingle Company. 669

Pacific Telephone and Telegraph Company, Litchman v. 149
Padden v. Thatcher. 681
Pantages Theatre Company, Anderson v. 24
Parker, State v. 428
Parrott & Company v. Benson. 117
Parry, Gill v. 19
Perkins, Kaufman v. 40
Phinney Avenue, In re. 262
Pitner, Spokane State Bank v. 177
Poston, Fenton v. 217
Powles & Company, Carstens v. 588

Page

Public Service Commission, North Coast Power Company v. ... 102
Public Service Commission, State ex rel. Seattle v. 646
Public Service Commission, State ex rel. Toppenish v. ... 301
Puget Sound Engineering Company, Neary v. ... 1

Reid, Daniel v. ... 211
Reid, Linn v. ... 609
Robeson v. G. G. No-Skid'm Tire Belt Company. . 98
Robinson, Jammie v. ... 275

Salzer v. Manfredi ... 666
Scandinavian American Bank, Hitt Fireworks Company v. ... 167
School District No. 81 of Spokane County, Hutchins v. ... 548
Seattle, Barton v. ... 331
Seattle, Boulton v. ... 234
Seattle North Pacific Shipbuilding Company, LeDoux v. ... 632
Shelley v. Norman ... 381
Simon v. Levy ... 556
Skoug v. Latour Creek Railroad Company ... 516
Smith v. Inland Empire Railroad Company ... 441
Smith, Johnson v. ... 311
Spokane v. Grady ... 700
Spokane State Bank v. Pitner ... 177
State v. Brown ... 699
State v. Burk ... 370
State v. Demas ... 596
State v. Ely ... 185
State v. Fairfield ... 699
State v. Hennessy ... 351
State v. Hoyle ... 290
State v. Jensen ... 401
State v. Jones ... 144

Page
State v. Kelch 601
State v. McChesney 113, 208
State v. McDermott 123
State v. McDonald 696
State v. Muller 660
State v. Parker 428
State v. Wallace 586
State v. Wilcox 14
State ex rel. Annette v. Morris 700
State ex rel. Ballard v. Superior Court, Kittitas County 663
State ex rel. Brown v. Brinker 47
State ex rel. Davis v. Superior Court, Lewis County 335
State ex rel. Deshler v. Deshler 507
State ex rel. Lindsley v. Grady 692
State ex rel. Ronald v. Clausen 520
State ex rel. Seattle v. Public Service Commission 646
State ex rel. Toppenish v. Public Service Commission 301
Superior Court, State ex rel. Ballard v 663
Superior Court, State ex rel. Davis v 335
Sussman v. Mitsui & Company 294

Teweles Seed Company v. Fairbanks 321
Thatcher, Padden v 681
Thomas v. Citizens' Realty Company 456
Turner, White v 405

Vachon v. Ditz 11
Van Horn, Wilson v 109

Wagner Company v. Craib & Company 139
Wallace, State v 586
Walla Walla v. Jensen Company 134
Walla Walla, Northern Pacific Railway Company v 153

Page
Walville Lumber Company, Hill v. 476
Western Talc Company, Capps v. 94
White v. Turner 405
Whiteside v. Benton County 463
Wilcox, State v. 14
Wilkinson, Kies v. 89
Wilson v. Van Horn 109
Worthy v. Arctic Company 435

Yelm Irrigation District, Longmire v. 619
Yost v. Johnson 61
Young, Gazzam v. 66

TABLE

OF

CASES CITED BY THE COURT

				Page
Accousi v. Stowers Furniture Co...	87	S. W. (Tex.Civ.App.)	861	315
Adams v. New York.....	192	U. S.	585.....	369
Adams v. Schmidtt.....	68	N. J. Eq.	168.....	584
Agnew, In re.....	89	Neb.	306.....	122
Albright's Estate, In re.....	156	N. Y. Supp.	821.....	686
Aldrich v. Wright.....	53	N. H.	398.....	375
Alfred v. State.....	151	Ala.	125.....	432
Allen v. Schultz.....	107	Wash.	393.....	38
Allen v. Tacoma Mill Co.....	18	Wash.	216.....	645
Altman's Estate, In re.....	149	N. Y. Supp.	601.....	688
American Sav. Bank & Tr. Co. v. National Surety Co.....	104	Wash.	663.....	8
Anderson v. Anderson.....	97	Wash.	202.....	473
Anderson v. Rucker Bros.....	107	Wash.	595.....565,	620
Anderson v. Spriestersbach.....	69	Wash.	393.....83,	84
Andersonian Inv. Co. v. Wade.....	108	Wash.	373.....	45
Anderton v. Milwaukee.....	82	Wis.	279.....	539
Armour & Co. v. North Dakota....	240	U. S.	510.....	122
Armstrong v. Burkett.....	104	Wash.	476.....	44
Baker v. Robbins.....	51	Wash.	467.....	299
Baker v. Yakima Valley Canal Co..	77	Wash.	70.....6,	7, 8
Baltimore & O. R. Co. v. Whitacre.	124	Md.	411.....	677
Barfield v. South Highlands Infirmary	191	Ala.	553.....	631
Barnard v. Campbell.....	58	N. Y.	73.....	612
Barrett v. State.....	220	N. Y.	423.....	372
Bartlett v. Lanphier.....	94	Wash.	354.....	524
Bate Refrigerating Co. v. Sulzberger	157	U. S.	1.....	524
Bayer v. Bayer.....	83	Wash.	430.....	56
Bellingham Bay Boom Co. v. Brisbois	14	Wash.	173.....	233
Benedict v. Hines.....	110	Wash.	338.....	447
Benham v. Columbia Canal Co....	74	Wash.	110.....	425
Bergeron, In re.....	220	Mass.	472.....	615

				Page
Bernhard v. Reeves	6	Wash.	424	238
Bever v. Spangler	93	Iowa	576	630
Bice v. Brown	98	Wash.	416	91
Big Bend Land Co. v. Huston	98	Wash.	640	542
Biglan v. Industrial Ins. Comm	108	Wash.	8	527, 529, 532
Bishop v. Ryan Const. Co.	106	Wash.	254	10
Blake-Rutherford Farms Co. v. Holt Mfg. Co	70	Wash.	192	300
Blanton v. Kansas City C. M. Co.	103	Kan.	118	224
Bloomer v. Todd	3	Wash. Terr.	599	615
Bollman, Ex parte	8	U. S.	74	360
Boothe v. Summit Coal Min. Co.	72	Wash.	679	243
Boston & M. C. C. etc. Co. v. Montana Ore Purch. Co	27	Mont.	431	214
Bowditch, The		Fed. Cas.	1,717	348
Brandt v. Northern Pac. R. Co.	105	Wash.	138	446
Bremerton Dev. Co. v. Title Trust Co.	67	Wash.	268	82, 83
Brodek v. Farnum	11	Wash.	565	586
Brotton v. Langert	1	Wash.	73	91, 92
Brown v. DeYoung	167	Ill.	549	243
Brown v. New Jersey	175	U. S.	172	369
Bryan v. Duff	12	Wash.	233	250
Buffalo Pitts Co. v. Dearing	37	Wash.	591	472
Bunck v. McAulay	84	Wash.	473	257, 289
Callvert v. Winsor	26	Wash.	368	274
Canefox v. Crenshaw	24	Mo.	199	381
Carlson v. Kies	75	Wash.	171	172
Carmichael v. Southern Bell Tel. & Tel. Co	157	N. C.	21	152
Carrick v. Mincke	60	Mo. App.	140	656
Carroll v. Hill Tract Imp. Co.	44	Wash.	569	504
Cave, In re	26	Wash.	213	246
Chapman v. Edwards	113	Wash.	224	454
Chapman v. Western Union Tel. Co.	88	Ga.	763	153
Chinook Lum. & S. Co. v. McLane Lum. & S. Co	107	Wash.	587	288
Citizens' Bank & Tr. Co. v. Limpright	93	Wash.	361	164
Clark v. Ellsworth	104	Iowa	442	624
Clopp v. Mear	134	Pa. St.	203	317
Cochran v. Stewart	21	Minn.	435	611, 612
Coey v. Darknell	25	Wash.	518	639
Cole v. Seattle, R. etc. R. Co.	42	Wash.	462	567, 572
Collins v. Spokane	64	Wash.	153	333, 334, 335
Collins v. Terminal Trans. Co.	98	Wash.	597	403, 404

				Page
Comet, The	205	Fed.	991	344
Commissioner of Public Charities etc. v. Leary	129	N. Y. Supp.	148	431
Commonwealth Bank v. Goodman	128	Md.	542	630
Connor v. Seattle	76	Wash.	37	333, 334
Connor & Groger, Inc. v. Forest Mills etc	108	Wash.	468	300
Cook v. Cole	55	Iowa	70	214
Corcoran v. Postal Tel-Cable Co	80	Wash.	570	32, 153
Cox v. Tompkinson	39	Wash.	70	691
Cram v. Chicago, B. & Q. R. Co	84	Neb.	607	524
Crampton v. McLaughlin Realty Co.	51	Wash.	525	424, 425
Crandall v. Puget Sound T., L. & P. Co	77	Wash.	37	567, 572
Cumberland Tel. & Tel. Co. v. Hendon	114	Ky.	501	153
Cumberland Tel. & Tel. Co. v. Hobart	89	Miss.	252	152
Cunningham v. Seattle Elec. R. & P. Co	3	Wash.	471	31, 32
Curtis' Estate, In re	88	Vt.	445	686
Curtley v. Security Sav. Society	46	Wash.	50	88
Dart v. McDonald	107	Wash.	537	449, 451, 452, 455
Davies v. Maryland Cas. Co	89	Wash.	571	225, 233
Davis v. Tacoma R. & P. Co	35	Wash.	203	31
Dawn, The		Fed. Cas.	3,666	344, 348
Day v. Henry	81	Wash.	61	91
Debs, In re	158	U. S.	564	28
DeMuth v. Faw	103	Wash.	279	608
DeRoberts v. Stiles	24	Wash.	611	504
Devitt v. Puget Sound T., L. & P. Co.	106	Wash.	449	238
Dickinson Fire etc. Co. v. Crowe & Co.	63	Wash.	550	299
Dickson v. Darnell	98	Wash.	301	640
Dilleber v. Home Life Ins. Co	87	N. Y.	79	629
Dimmick v. Collins	24	Wash.	78	639
Dolph v. Cross	153	Iowa	289	172
Driscoll v. Devenere	110	Wash.	307	316
Duggan v. Pacific Boom Co	6	Wash.	593	260
Duncan's Estate, In re	113	Wash.	165	683, 686, 687
Dunkin v. Hoquiam	56	Wash.	47	698
Dunn v. Kemp & Hebert	36	Wash.	183	314
Durkee v. Janesville	28	Wis.	464	539
Dyer v. Middle Kittitas Irr. Dist.	40	Wash.	238	238

			Page
Ebling v. Nielsen	109	Wash. 355	38
Eckert v. Schmitt	60	Wash. 23	691
Eilers Music House v. Hopkins	73	Wash. 281	93
Elliott v. Lessee of Wm. Peirsol	1	Peters (U. S.) 328	535
Ellis v. Seattle	47	Wash. 578	333
Ellis v. United States	206	U. S. 246	367
Emerson-Brantingham Imp. Co. v. England	186	S. W. 1181	568, 573
Emmons v. Charlton & Co	63	Wash. 276	316
Equitable Bldg. & Loan Ass'n v. Bank of Commerce & T. Co	118	Tenn. 678	84
Ewing v. Hatcher	175	Iowa 443	629
Falley v. Giles	29	Ind. 114	668, 669
Fehler v. Montesano	110	Wash. 143	261
Ferguson v. Gies	82	Mich. 358	28
Ferrel's Estate, In re	112	Wash. 231	683, 687
Fick's Estate, In re	111	Wash. 318	65, 66
Finlay v. Tagholm	62	Wash. 341	8
Finn's Estate, In re	106	Wash. 137	454
First Church etc. v. Southern S. & C. Co	76	Wash. 367	299
Fisher Flouring Mills Co. v. Brown	109	Wash. 680	120
Fisk Rubber Co. v. Pinkey	100	Wash. 220	251
Flessher v. Carstens Packing Co	81	Wash. 241	30
Florence, The	16	Jur. 572	345
Fogarty v. Northern Pac. R. Co	85	Wash. 90	439
Foley, Ex parte	172	Cal. 744	119, 121
Ford v. Aetna Life Ins. Co	70	Wash. 29	221, 223, 225, 232, 233
Foren v. Rodick	90	Me. 276	314, 317
Forsyth v. Dow	81	Wash. 137	473
Fortson Shingle Co. v. Skagland	77	Wash. 8	338
Foster v. Industrial Ins. Comm	107	Wash. 400	530
Fox v. Washington	236	U. S. 273	360
Frasier v. Cowlitz County	67	Wash. 312	332
Gabriel v. Kildare Elevator Co	18	Okl. 318	496
Garrigan v. United States	163	Fed. 16	695
Gaskill v. Northern Assurance Co	73	Wash. 668	174
Gazzam v. Young	114	Wash. 66	76
Geiger v. The Mary Hale		Fed. Cas. 9,213	348
Geissler's Estate, In re	99	Wash. 452	337
German Am. Bank v. Wright	85	Wash. 460	165
Gilbraith v. Stewart Transp. Co	121	Fed. 540	344, 345
Globe Milling Co. v. Minnesota Elev. Co	44	Minn. 153	612

			Page
Golay v. Northern Pac. R. Co.	105	Wash. 132	446
Goldthorpe v. Clark-Nickerson Lum. Co.	31	Wash. 467	567, 571
Good, In re	65	Ind. App. 426	531
Gordon v. Cummins	152	Mass. 513	318
Goshorn v. People's Nat. Bank	32	Ind. App. 428	174
Graves v. Columbia Underwriters	93	Wash. 196	453
Gray v. Boyle	55	Wash. 578	164, 251
Gray v. Reeves	69	Wash. 374	93
Grubb v. House	93	Wash. 200	46
Gulf, C. & S. F. R. Co. v. Harbison	99	Tex. 536	565
Gulf, Colorado etc. R. Co. v. Ellis	165	U. S. 150	539
Gund v. Parke	15	Wash. 393	195
Hadfield v. Lundin	98	Wash. 657	219
Hagan v. Lucas	10	Peters (U. S.) 400	213
Hall v. Land		Fed. Cas. 3,939	344, 350
Hammock v. Tacoma	40	Wash. 539	333, 334
Hanna v. Reeves	22	Wash. 6	586
Hanrion v. Hanrion	73	Kan. 25	504
Harbaugh v. Citizens' Tel. Co	190	Mich. 421	152
Harrild v. Spokane School Dist	112	Wash. 266	299
Harrington v. Hall	6	Penne. (Del.) 72	380
Harris v. Hutchison	160	Iowa 149	695
Harvest, The		Fed. Cas. 6,176	348
Hathaway v. McDonald	27	Wash. 659	121
Hays v. Merchants' Nat. Bank	14	Wash. 192	504
Hayward v. Merrill	94	Ill. 349	318
Hazeltine v. Brockway	26	Colo. 291	585
Hendrick v. Daniel	119	Ga. 358	72
Henry v. Bruhn & Henry	110	Wash. 321	181, 668
Hill v. Young	7	Wash. 33	691
Hinckley v. Casey	45	Wash. 430	74
Hinkhouse v. Wacker	112	Wash. 253	45
Hobart v. Drogan	10	Pet. (U. S.) 108	344, 348
Hobbs v. Great Northern R. Co	80	Wash. 678	681
Hoffman v. Dickson	47	Wash. 431	137
Hoffman v. Dickson	65	Wash. 556	138
Holder Borden		Fed. Cas. 6,600	344
Hollenbeck v. Clemmer	66	Wash. 565	315
Holt Mfg. Co. v. Strachan	77	Wash. 380	300
Home Fire Ins. Co. v. Barber	67	Neb. 644	243
Hossack v. Graham	20	Wash. 184	201, 204
Houghton v. First Nat. Bank	26	Wis. 663	175
Houser & Haines Mfg. Co. v. McKay	53	Wash. 337	297
Howard v. Tacoma School Dist. No. 10	88	Wash. 167	466

		Page
Howe v. Myers	94 Wash. 563	207
Howell v. Big Horn Basin Col. Co.	14 Wyo. 14	621
Hubbard v. Preston	90 Mich. 221	380
Huling v. Cabell	9 W.Va. 522	176
Hull v. State	93 Ind. 128	432
Hunt v. Allison	77 Wash. 58	129, 289
Hunt v. State	3 Ind. App. 383	379
Hurff v. Hires	40 N. J. L. 581	398
Hurley-Mason Co. v. American Bonding Co	79 Wash. 564	9
Huston v. Harrington	58 Wash. 51	657
Hutchinson Ice Cream Co. v. Iowa	242 U. S. 153	121
Ihrke v. Continental Life Ins. etc. Co.	91 Wash. 342	425
Illinois Cent. R. Co. v. Sanderson	175 Ky. 11	315
Ingebrigt v. Seattle Taxicab & Tr. Co.	78 Wash. 433	197
Interstate Commerce Comm. v. Louisville & N. R. Co	227 U. S. 88	648
Interstate Commerce Comm. v. Union Pac. R. Co	222 U. S. 541	648
Johnson v. Ramberg	49 Minn. 341	315
Johnston v. Nichols	83 Wash. 394	238
Jorgenson v. Crane	86 Wash. 273	553
Joseph v. Bidwell	28 La. Ann. 382	32
Kent v. Walla Walla V. R. Co	108 Wash. 251	444, 446
Kidwell v. Brummagim	32 Cal. 436	58
Kies v. Wilkinson	101 Wash. 340	89, 172
Kincaid v. Seattle	74 Wash. 617	468
Kizer v. Caufield	17 Wash. 417	535
Kneass v. Cremation Society	103 Wash. 521	32, 153
Lanham v. McWilliams	6 Ga. App. 85	668
Larson v. American Bridge Co	40 Wash. 224	238
Lauridsen v. Bowden, Gazzam & Arnold	107 Wash. 310	238
Lavenberg's Estate, In re	104 Wash. 515	64
Lawrence v. Halverson	41 Wash. 534	586
Ledingham v. Blaine	105 Wash. 253	10
Lee v. Butler	167 Mass. 426	657
Lehman v. Amsterdam Coffee Co.	146 Wis. 213	315
Leslie v. Mathwig	131 Minn. 159	658
Levine v. Barry	114 Wash. 623	642

			Page
Lindquist v. Seattle	67	Wash. 230	332
Livieratos v. Commonwealth Sec. Co.	57	Wash. 376	635
Lloyd v. Calhoun	78	Wash. 438	387
Lloyd v. Calhoun	82	Wash. 35	388
Louisville N. A. & C. R. Co. v. Falvey	104	Ind. 409	630
McClure v. Campbell	42	Wash. 252	31
McCord v. Rosene	39	Wash. 1	561
McCowen v. Northeastern Siberian Co.	41	Wash. 675	639
McDonald v. Rhode Island Co	26	R. I. 467	630
McDonnell v. Coeur d'Alene Lumber Co.	56	Wash. 495	287
McGrew v. Lamb	31	Wash. 485	542
McKinney v. Port Townsend & P. S. R. Co	91	Wash. 387	444
McNamee v. Tacoma	24	Wash. 591	535
McNaughton v. Illinois Cent. R. Co.	136	Iowa 177	315
McRae v. Lonsby	130	Fed. 17	289
McRea v. Warehime	49	Wash. 194	112
Maggs v. Seattle	86	Wash. 427	332, 334
Magoun v. Illinois Trust & Sav. Bank	170	U. S. 283	539
Maranovitch, In re	65	Ind. App. 489	531
Marvin v. Yates	26	Wash. 50	116
Maryland Cas. Co. v. Peppard	53	Okl. 515	222, 223
Maryland Cas. Co. v. Seattle Elec. Co.	75	Wash. 430	404
Massasoit, The		Fed. Cas. 9,260	348
Matzger v. Arcade Bldg. & R. Co.	80	Wash. 401	44, 45, 46
Mayhew v. Brislin	13	Ariz. 102	630
Mesner v. Bank		Fed. Cas. 9,493	248
Miller v. Kansas City W. R. Co	180	Mo. App. 371	568, 569
Minch, The	61	Fed. 511	344
Minch, The	73	Fed. 859	344, 345, 347
Mitchell v. Tacoma R. & M. Co	9	Wash. 120	555
Moore's Estate, In re	122	N. Y. Supp. 828	686
Morris v. Williford	70	S. W. 228	568, 569, 573
Morrison v. Chicago, M. & St. P. R. Co	103	Wash. 650	679
Morrow v. Smith	145	Iowa 514	684
Morton v. Hines	112	Wash. 612	466
Moses' Estate, In re	123	N. Y. Supp. 443	686

			Page
Mulligan v. Seattle	42	Wash. 264	333
Munch v. Shabel	37	Mich. 166	504
Nabours v. Seattle	113	Wash. 557	238
Nahl v. Alta Irr. Dist	23	Cal. App. 333	621
Nance v. Woods	79	Wash. 188	338
Nash v. Brewster	39	Minn. 530	399
National City Bank v. Shelton Elec. Co.	96	Wash. 74	164
National Surety Co. v. Udd	65	Wash. 471	162
Newman, In re	124	Cal. 688	561
Newman v. Worthen	57	Wash. 467	74
Nichols v. Oregon S. L. R. Co	25	Utah 240	631
Niphon's Crew, The		Fed. Cas. 10,277	348
Noble v. Olympia Brewing Co	64	Wash. 461	299
Nollmeyer v. Tacoma R. & P. Co	95	Wash. 595	261
Nordgren v. Lawrence	74	Wash. 305	31
Norman v. Bellingham	46	Wash. 205	446
North Carolina R. Co. v. Zachery	232	U. S. 248	678, 679
Northern Bank & Tr. Co. v. Day	83	Wash. 296	244
Northern Mercantile Co. v. Schultz	56	Wash. 393	299
North Sterling Irr. Dist. v. Dickman	59	Colo. 169	621
Noyes v. Cosselman	29	Wash. 635	467
Noyes v. Pugin	2	Wash. 653	639
O'Brien v. People	216	Ill. 354	693
O'Brien v. Umatilla	29	Fed. 252	348
O'Keefe v. Leistikow	14	N. D. 355	398
Olive Co. v. Meek	91	Wash. 169	643
Olson v. Erickson	53	Wash. 458	567
O'Meara v. Russell	90	Wash. 557	32
Orme v. Baker	74	Ohio St. 337	175
Orr v. Schwager & Nettleton	74	Wash. 631	18
O'Toole v. Faulkner	34	Wash. 371	18
Ott v. Press Pub. Co	40	Wash. 308	31
Pacific Sheet Metal Works v. Roeder	26	Wash. 183	539
Paich v. Northern Pac. R. Co	82	Wash. 581	238
Palmer v. Laberee	23	Wash. 409	524
Parkhurst v. Burrill	228	Mass. 197	688
Parkhurst v. Elliott	103	Wash. 89	129, 289
Patterson v. Adam	119	Minn. 308	224
Patterson v. Wenatchee Canning Co.	53	Wash. 155	439
Peet v. Mills	76	Wash. 437	530

			Page
People v. Augsburry	97	N. Y. 501	631
People v. Dooley	75	N. Y. Supp. 350	539
People v. Rae	66	Cal. 423	615
People ex rel. Bolton v. Albertson	55	N. Y. 50	539
People ex rel. New York & Q. Gas Co. v. McCall	245	U. S. 345	648
Perkins, John		Fed. Cas. 7,360	344
Peters v. Lewis	28	Wash. 366	467
Peters v. Union Gap Irr. Dist.	98	Wash. 412	439
Peterson v. People	74	Ill. App. 178	432
Phelps v. Hunt	40	Conn. 97	625
Phelps Lbr. Co. v. Bradford-Kennedy Co	96	Wash. 503	645
Philadelphia, B. & W. Co. v. Tucker	35	App. D. C. 123	678, 679
Philadelphia, B. & W. R. Co. v. Smith	250	U. S. 101	676
Philbrick v. Andrews	8	Wash. 7	691
Pierce v. Stevens	205	Mass. 219	688
Pinch v. Anthony	8	Allen (Mass.) 536	205
Platt v. Union Pac. R. Co	99	U. S. 48	615
Plummer v. Great Northern R. Co.	60	Wash. 214	112
Plummer v. Northern Pac. R. Co.	98	Wash. 67	111
Portland v. Erickson	39	Ore. 1	48, 49
Puget Sound Imp. Co. v. Frankfort etc. Ins. Co	52	Wash. 124	232
Puget Sound State Bank v. Gallucci	82	Wash. 445	6, 8, 9
Qualls v. State	92	Ark. 200	432
Ralton v. Sherwood Logging Co.	54	Wash. 254	116
Randall v. Packard	142	N. Y. 47	624
Raynor v. Tacoma R. & P. Co.	70	Wash. 133	404
Reed v. Hussey		Fed. Cas. 11,646	348
Reeve v. Northern Pac. R. Co	82	Wash. 268	680
Robertson v. O'Neill	67	Wash. 121	639
Roe v. Standard Furniture Co	41	Wash. 546	238
Rowland v. St. Louis & S. F. R. Co.	244	U. S. 106	649
Roy's Estate, In re	113	Wash. 277	594
Salo v. Pacific Coast Cas. Co	95	Wash. 109	229
Scandinavian-Am. Bank v. Johnston	63	Wash. 187	164, 251
Schambs v. Fidelity & Cas. Co. of N. Y	259	Fed. 55	224
Seargeant v. Russell	110	Wash. 216	73
Seattle v. Molin	99	Wash. 210	355, 357
Seattle v. Pearson	15	Wash. 575	30, 49, 50

				Page
Seattle & P. S. P. Co. v. Seattle	51	Wash.	49	156
Security Sav. & Tr. Co. v. Hackett	27	Wash.	247	542
Seldomridge v. Farmers' & Merchants' Bank	87	Neb.	531	401
Sevier v. Hopkins	101	Wash.	404	299
Sexsmith v. Brown	61	Wash.	164	439
Sheard v. United States Fid. & Guar. Co	58	Wash.	29	232
Shelinsky v. Foster	87	Conn.	90	657
Sheridan v. Doherty	106	Wash.	561	70, 71
Singer v. Martin	96	Wash.	231	261
Singly v. Warren	18	Wash.	434	504
Smith, Ex parte	135	Mo.	223	365
Smith v. Anderson	10	N. Y. Supp.	278	175
Smith v. Buckman	22	Wash.	299	257
Smith v. People	53	N. Y.	111	615
Sommerville v. Chesapeake & Potomac Tel. Co	258	Fed.	147	152
Spangler's Estate, In re	148	Iowa	333	685
Speck v. Northern Pac. R. Co	108	Minn.	435	315
Spiller v. Atchison, etc. R. Co	253	U. S.	117	649
Spokane Canal Co. v. Coffman	54	Wash.	645	424
Spreitzer v. Miller	98	Wash.	601	45
Springer's Estate, In re	97	Wash.	546	201
Stanton v. Dennis	64	Wash.	85	287
Stanton v Embrey	93	U. S.	548	624
State v. Ackles	8	Wash.	462	292
— v. Aker	54	Wash.	342	116
— v. Barr	11	Wash.	481	380
— v. Boyce	24	Wash.	514	257
— v. Brown	108	Wash.	205	363, 364
— v. Brummett	98	Wash.	182	354
— v. Carey	4	Wash.	424	291
— v. Carey	15	Wash.	549	661
— v. Carter	8	Wash.	272	429
— v. Champoux	33	Wash.	339	661
— v. Chittenden	111	Wash.	213	188
— v. Conner	107	Wash.	571	587
— v. Cotz	94	Wash.	163	603, 605
— v. Cushing	17	Wash.	544	187
— v. Dengel	24	Wash.	49	292
— v. Dodd	84	Wash.	436	355, 357
— v. Driscoll	86	Wash.	245	603
— v. Feilen	70	Wash.	65	362
— v. Fox	71	Wash.	185	359, 362
— v. Fraternal Knights & Ladies	35	Wash.	338	361

				Page
State v. Garbroski	111	Iowa	496	539
— v. Gaul	88	Wash.	295	354, 597, 598
— v. George	84	Wash.	113	364
— v. Gustafson	87	Wash.	613	603
— v. Hall	54	Wash.	142	292
— v. Hawkins	27	Wash.	375	257
— v. Hennessy	114	Wash.	351	699, 700
— v. Hodoff	88	Wash.	413	18
— v. Hood	103	Wash.	489	191
— v. Jackson	83	Wash.	514	597, 598
— v. Jacobson	80	Ore.	648	119, 121
— v. Johnson	103	Wash.	59	191
— v. Klein	94	Wash.	212	354, 357
— v. Lavery	31	Ore.	77	695
— v. Lowery	104	Wash.	520	358, 359, 370
— v. McBride	72	Wash.	390	697
— v. McCann	16	Wash.	249	661
— v. Marion	68	Wash.	675	404
— v. Mollen	140	Minn.	112	360
— v. Montgomery	56	Wash.	443	191
— v. Moody	7	Wash.	395	661
— v. Moretti	66	Wash.	537	116
— v. Morgan	31	Wash.	226	292
— v. Newton	29	Wash.	373	587, 697
— v. Nichols	28	Wash.	628	361
— v. Nichols	61	Wash.	142	361
— v. O'Hare	36	Wash.	516	429
— v. Parker	25	Wash.	405	116, 117
— v. Pettit	74	Wash.	510	354, 357
— v. Pitney	79	Wash.	608	120
— v. Robinson	12	Wash.	491	187, 188
— v. Rutten	13	Wash.	203	661
— v. Skilbrick	25	Wash.	555	617
— v. Snohomish County	71	Wash.	320	590
— v. Stentz	30	Wash.	134	661
— v. Strasburg	60	Wash.	106	368
— v. Surry	23	Wash.	655	698
— v. Underwood	35	Wash.	558	116
— v. Vance	29	Wash.	435	587
— v. Van Waters	36	Wash.	358	698
— v. Ward	96	Wash.	550	188
— v. Ward	170	Iowa	185	374, 381
— v. Wingard	92	Wash.	219	354, 357
State ex rel. Beason v. Law	93	Kan.	357	431
— Carroll v. Superior Ct	113	Wash.	54	700
— Cole v. New Whatcom	3	Wash.	7	411

			Page
State ex rel. Conner v. Superior Ct..	81 Wash.	480	538, 540
— Davis-Smith Co. v. Clausen	65 Wash.	156	530
— Deavers v. French	78 Wash.	260	339
— Dunham v. Superior Ct...	106 Wash.	507	339
— Farmer v. Bell	101 Wash.	133	339
— Grays Harbor Logging Co. v. Superior Ct	82 Wash.	503	664
— Hart v. Clausen	113 Wash.	570	361
— Lefebvre v. Clifford	65 Wash.	313	338
— Lincoln v. Superior Ct....	111 Wash.	615	664
— Mead v. Superior Ct	108 Wash.	636	337
— Mutual Union Ins. Co. v. Fishback	97 Wash.	565	229
— Redlinger v. Superior Ct...	113 Wash.	244	535
— Russell v. Superior Ct	77 Wash.	631	338
— Russell v. Superior Ct....	113 Wash.	253	337
— Seattle v. Public Service Comm.	76 Wash.	492	106
— Stephens v. Superior Ct...	111 Wash.	205	664
Stephens v. Chehalis Nat. Bank...	80 Wash.	254	172
Stephens v. Pennsylvania Cas. Co..	135 Mich.	189	225
Stertz v. Industrial Ins. Comm....	91 Wash.	588	530
Stirling v. Seattle, R. & S. R. Co..	198 Fed.	913	213
Stone v. Smith-Premier Typewriter Co.	48 Wash.	204	316
Sullivan v. Johnson	30 Wash.	72	467
Sutton v. Snohomish	11 Wash.	24	465
Sweeney v. Lewis Const. Co	74 Wash.	303	94
Taylor v. Kidd	72 Wash.	18	403
Taylor v. Star Coal Co	110 Iowa	40	630
Tenant v. Kuhlemeier	19 Ann. Cas.	1026	524
Texas v. Palmer	158 Fed.	705	213
Texas & P. R. Co. v. O'Mahoney...	24 Tex. Civ. App.	631	565
Thompson v. Rhodehamel	71 Wash.	24	300
Thompson v. State	67 Ala.	106	380
Thorne v. Turck	94 N. Y.	90	615
Tillman v. Murrell	120 Ala.	239	505, 506
Timkin's Estate, In re	158 Cal.	51	684
Titchenell v. Titchenell	74 W. Va.	237	504
Tobin v. Tobin	139 Wis.	494	504
Tooker v. Perkins	86 Wash.	567	386
Torrey v. Kelly	121 Fed.	542	344
Town Board of Royalton, In re....	122 N. Y. Supp.	844	309
Tracy v. Albany Exchange Co	7 N. Y. (Selden)	472	184
Trustees, etc. v. Hoyle	139 N. Y. Supp.	1098	668

			Page
Turner v. Great Northern R. Co...	15	Wash. 213	152
Two Catherines		Fed. Cas. 14,288	348
Underwood v. Tew	7	Wash. 297	143
United States v. Elliott	64	Fed. 27	695
United States v. Ninety-nine Diamonds	139	Fed. 961	524
United States v. Sanges	144	U. S. 310	48
United States v. Union Pac. R. Co..	91	U. S. 72	615
Van Horn v. Nestoss	99	Wash. 328	110, 111
Vanordstrand v. Northern Pac. R. Co.	86	Wash. 665	681
Veazey, In re	80	N. J. Eq. 466	595
Volz v. Zang	113	Wash. 378	454
Von Arnim v. American Tubeworks	188	Mass. 515	242
Wagner v. Northern Life Ins. Co..	70	Wash. 210	473
Wagner v. Seattle	84	Wash. 275	333, 334
Walker v. Brown	165	U. S. 654	201
Warwick v. Corbett	106	Wash. 554	289
Warwick v. Hitchings	50	Wash. 140	639
Washington Nat. Bank v. Pierce..	6	Wash. 491	175
Washington State Bank of Ellensburg v. Dickson	35	Wash. 641	43
Waters v. Langdon	40	Barb. (N. Y.) 408	539
Weander v. Claussen Brewing Ass'n	42	Wash. 226	70
Weeks v. United States	232	U. S. 383	369
Weigle v. Curtice Bros. Co	248	U. S. 285	122
Wells v. Duffy	69	Wash. 310	250
Wells v. Weston	22	Mo. 384	539
West Chicago S. R. Co. v. Fishman	169	Ill. 196	630
West Coast Imp. Co. v. Winsor	8	Wash. 490	132, 134
Western Union Tel. Co. v. Ferguson	26	Ind. App. 213	153
White's Estate, In re	103	N. Y. Supp. 688	686
Williams v. Great Northern R. Co.	68	Minn. 55	630
Willson v. Northern Pac. R. Co.	5	Wash. 621	31, 32
Womach v. Sandygren	96	Wash. 12	586
Wood v. Tacoma	66	Wash. 266	467
Woonsocket Rubber Co. v. Loewenberg Bros	17	Wash. 29	612
Woste v. Rugge	68	Wash. 90	195
Wright v. Beardsley	46	Wash. 16	31

		Page
Yakima Valley Bank v. McAllister	37 Wash. 566	257
Young v. Lohr	118 Iowa 624	84
Young v. Porter	27 Wash. 551	42
Young Men's Christian Ass'n v. Gibson	58 Wash. 307	8
Zapora, The	205 Fed. 1004	344
Zinn v. Knopes	111 Wash. 606	44

STATUTES
CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.

	Page
Art. 1 § 5	359
" 1 §§ 7, 9	369
" 1 § 12	534, 537
" 1 § 19	538
" 1 § 22	368
" 17 § 1	132

CODE OF 1881.

Sections 830, 831, 834, 835, 851, 853	614

REMINGTON AND BALLINGER'S CODE.

Section 827	73
" 2178, 2179	603

REMINGTON'S CODE.

Section 182	194
" 209-1, 209-2	338
" 221, 222	543
" 243	269, 271
" 330	697
" 339	403, 430
" 431	473
" 474	582
" 597	504
" 812	544
" 812, subd. 4	67
" 817, 818	543
" 820	75
" 827	544
" 998	273
" 1002	48, 49, 50
" 1064	507
" 1131	206
" 1159-1	10
" 1211	594, 595
" 1664 to 1667	112

REMINGTON'S CODE—*Continued.*

	Page
Section 1727	214
" 2065	358
" 2129	612, 613, 615, 617
" 2135	587
" 2137	430
" 2265	362
" 2286	603, 604
" 2370	580, 581
" 2410	291
" 2435, subd. 4, 5	192
" 2601	612, 613, 614
" 2661	197
" 2686	27
" 3407	179
" 3416	164
" 3417, 3418	165
" 3443	248
" 3447	163, 249
" 3450	249
" 4107	533, 536
" 5290	496
" 5293, 5294	22
" 5395-33	371
" 5466-1	119
" 5561-4	413
" 5562-37	226
" 5918	45, 92
" 6442, 6443	80, 85
" 6604-5	527
" 6750	132, 133
" 7671-14	307
" 7892-13	156
" 7995	332
" 7997	332
" 8626-26	104
" 8626-27	105, 106, 108

REMINGTON'S CODE—*Continued.*

Page

Section 8626-28.....105, 106, 108
" 8626-34.....107, 108
" 8626-86..... 304
" 8733-2.....305, 307, 309
" 8733-3.....305, 309
" 8733-4.....308, 309
" 9235..... 590

SESSION LAWS.

1854, p. 83, §§ 45, 46..... 613
p. 84, § 51.....614, 617
p. 84, § 53..... 613
p. 85, §§ 54, 55..... 614
1893, p. 407..... 274
1895, p. 115, § 4..... 49
1909, p. 890..... 364
p. 997, § 349..... 614
1911, p. 360, § 5..... 527
1913, p. 267..... 533
p. 267, § 1..... 536
1915, p. 65..... 413
p. 227 .....219, 225, 226, 227
p. 228, § 2..... 228
p. 274 118
p. 274, § 1, subd. c.....
.....118, 119, 122
p. 493, § 3..... 614
1917, p. 46..... 146
p. 60, § 11..... 146
p. 61, § 12..... 147

SESSION LAWS—*Continued.*

Page

1917, p. 81, § 1..... 529
p. 327 521
p. 597, § 6..... 682
p. 642 57
p. 664, § 88..... 559
p. 670, § 103.....63, 65
p. 678, § 127..... 60
p. 684, § 146..... 57
p. 705, § 216..... 112
p. 706, § 219..... 57
p. 706, § 220..... 58
1919, p. 90, § 1..... 412
p. 124, § 34.....412, 413
p. 154 .....521, 522
p. 290 118
p. 362, § 1, subds. f, g...531, 532
p. 362, § 4..... 528
p. 363 530
p. 490 522
p. 518, § 1..... 353
p. 519, subd. 3..... 365

ORDINANCES.

Everett, No. 1908, § 1.....
.....407, 408, 412
Everett, No. 1908, §§ 2, 3, 4..
.....407, 408
Everett, No. 1908, §§ 5, 6.... 409
Seattle, No. 37,434, §§ 21, 31,
52 38

ERRATA

Page 157, 2d syllabus, 2d line, for *debtor* read *creditor*
Page 157, last syllabus, 1st line, for *debtor* read *creditor*

ERRORS NOTED IN PREVIOUS VOLUMES

Vol. 113 Wash.

Page 54, bottom of page, for *193 Pac. 236*, read *193 Pac. 226*

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 15907. Department Two. January 7, 1921.]

EDWIN NEARY, *Appellant*, v. PUGET SOUND ENGINEERING COMPANY *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS (158) — PUBLIC IMPROVEMENTS — CONTRACTOR'S BONDS — PERSONS SECURED — EMPLOYEES OF MATERIALMAN. One who contracts with a contractor to furnish all the sand and gravel to be used in the construction of a street is not a "subcontractor" but a materialman, though the contract provided that delivery of the sand and gravel should be "on the work as directed and required," and that rejected material should be replaced; hence employees of the one furnishing the sand and gravel who failed to give the statutory notice under Rem. Code, § 1159-1, cannot recover on the contractor's bond.

SAME (158, 159-2) — PERSONS SECURED — CONTRACTOR'S BOND — "SUPPLIES" — NOTICE — NECESSITY. Employees of one furnishing gravel to a contractor for a public improvement, who fail to give the statutory notice required under Rem. Code, § 1159-1, of persons furnishing material or "supplies" cannot recover for their services on the contractor's bond.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 2, 1920, dismissing, on the merits, an action upon a contractor's bond, after a trial to the court. Affirmed.

Edgar J. Wright, for appellant Neary.

Kelleran & Hannan, for appellant Sparks.

Roberts & Skeel and *L. B. Schwellenbach*, for respondents.

[1]Reported in 194 Pac. 830.

TOLMAN, J.—In April, 1919, the respondent Puget Sound Engineering Company entered into a contract with the city of Kent to pave certain streets and, as required by the contract, gave a bond executed by the respondent United States Fidelity & Guaranty Company, conditioned:

"This bond is executed in pursuance of the laws of the state of Washington, as now in force, and is subject to all the provisions thereof, and is entered into with the city of Kent, Washington, its mayor and common council, and also for the use of persons who may perform or cause to be performed any work or labor, or furnish or cause to be furnished any skill, labor or material in the execution of a certain contract made the 25th day of April, A. D. 1919, between the said principal, the Puget Sound Engineering Company and the city of Kent, its mayor and common council for the improvement of Harrison street et al. as ordered by Ordinance No. 417-418-419-420 approved, local improvement district No. 181A, 181B, 182A, 182B and 183, by paving, in accordance with said contract, which contract is hereby attached and made a part hereof."

The contract attached to and made a part of the bond, provides:

"That, in consideration of the payments, covenants and agreements hereinafter mentioned to be made and performed by the city of Kent, the contractor hereby covenants and agrees as follows:

"(1) To do all work and furnish all the material necessary to construct, improve and complete certain streets and avenues in the city of Kent, known as the 1919 pavement, in accordance with and as described in the attached profiles, maps, plans and specifications which are hereby made a part hereof and shall have the same effect as though the same were fully inserted herein, and in full compliance with the terms, conditions and stipulations of this agreement.

"(2) The contractor shall provide and be at the expense of all materials, labor, carriage, tools, imple-

ments and conveniences and things of every description which may be requisite for the transfer of materials and for improving, construction and completing the work above described . . . provided, that before the making of such final payments the contractor shall show to the satisfaction of the city of Kent that all just debts due all laborers, mechanics, materialmen and persons who have supplied such contractor or subcontractor with material or goods of any kind for this work, have been paid. . . .

"Provided further, that if prior to any payment being made the city received notice from any person or persons that any laborers, mechanics, materialmen or other persons, who have furnished or supplied such contractor or any subcontractor with any labor, service, material, goods or provisions of any kind in connection with the construction of said work have claims against said contractor or any subcontractor, for any such service or things, for which claim any such laborer, mechanic, materialman or other person would be entitled to a lien under the laws of this state were said work not a public work, on a proper claim against the bond in such cases required by law, the city shall have the right to retain out of the payments then due or to become due to said contractor, an amount in addition to the twenty (20) per cent above provided to be retained until the final completion of said work, sufficient to cover all such claim or claims of which notice shall have been so given until such claim or claims shall have been fully satisfied and paid, and receipts in full for the same shall have been furnished by the said contractor to the city of Kent and the said contractor hereby expressly agrees to pay all such claims. . . .

"(13) The contractor shall not let, assign, or transfer this contract or any interest therein, or sublet the work herein provided to be done, or any part thereof, without the consent of the city of Kent. The contractor shall file with the city a duplicate of all subcontracts made by him as aforesaid. . . .

"(16) The contractor agrees to execute and furnish to the city a good and sufficient corporate surety bond,

to be payable to the city of Kent, and to be in the penal sum of the full amount of the contract, conditioned that he will perform the work upon the terms, within the time, and in accordance with the contract, profiles, maps, plans and specifications, and that he will indemnify the city against any direct or indirect damages that shall be suffered or claimed for injuries to persons or property during the construction and improvement of such streets and until the same is accepted; and further conditioned as required by law for the payment of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractor with provisions or supplies for the carrying on of such work, and all just debts, dues and demands incurred in the performance of such work. . . .

"(17) The city of Kent promises and agrees with the contractor to employ and does employ him to provide the materials and to do and to cause to be done the work upon said streets and avenues, and to complete and finish the same according to the plans and specifications and the terms and conditions herein contained and referred to for the price aforesaid, and hereby contracts to pay the same at the time and in the manner and upon the conditions above set forth."

Thereafter, the contractor entered into an agreement with one L. P. Harmon, in which contract Harmon agreed:

"To furnish all of the sand and gravel which may be required for the improvement work in the city of Kent for which the parties of the first part hold the contract. . . . The party of the second part herein agrees to furnish such sand and gravel at a uniform average rate of not less than fourteen hundred (1400) cubic yards per week, and the parties of the first part agree to receive not less than the above stated amount per week.

"The party of the second part further agrees that the quality of said sand and gravel shall be acceptable to the city engineer of the city of Kent, and to replace any material which may be condemned by said city

engineer of Kent free of any additional cost to the parties of the first part.

"Parties of the first part hereby agree to pay for said sand and gravel as follows: Two dollars and seventeen and one-half cents ($2.17½) per yard delivered in the city of Kent on the work as directed and required by the parties of the first part. . . .

"The said party of the second part hereby agrees and covenants that in the event of his failure to carry out the terms of this contract which would cause the party of the first part unnecessary delay, that the party of the first part shall have the right to purchase such sand and gravel from any other source of supply which they may deem expedient, and that any additional cost by reason of said purchase shall be borne by the party of the second part. The parties of the first part shall have the right to judge as to the advisability of purchasing such materials from other sources. . . .

"It is mutually agreed between the party of the first part and the party of the second part that the value of said sand and gravel shall be considered as forty (40) cents per cubic yard at the bunkers, it being distinctly understood, however, that the parties of the first part are purchasing this material delivered on the job as above described and have nothing whatsoever to do with the method or mode of delivery."

Harmon employed the appellants, and others whose claims were assigned to appellant Neary, to haul this sand and gravel, using their own trucks, and agreed to pay them each $3.50 per hour while so engaged in the work. Their unpaid claims, aggregating $583.31, were properly and duly filed with the clerk of the city of Kent. Appellant Neary, as plaintiff, brought this action against the contractor and bonding company, alleging that Harmon was a subcontractor and that the work was performed for him and at his request, and demanded judgment accordingly. At the trial below, it was stipulated that the agreement between Harmon

and the Puget Sound Engineering Company was never filed with the clerk of the city of Kent. The validity and justness of these various claims as against Harmon was not disputed, but the right to enforce them against the contractor or the bond was contested. The trial court sustained this contention, and entered a judgment of dismissal, from which this appeal is prosecuted.

Two questions are raised here: (1) Was Harmon a subcontractor? and (2) if Harmon was a materialman and not a subcontractor, can appellant recover under the rule laid down by this court in *Puget Sound State Bank v. Gallucci,* 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767?

We think the first question must be answered in the negative, under the authority of *Baker v. Yakima Valley Canal Co.,* 77 Wash. 70, 137 Pac. 342. It is true that in the *Baker* case, the sand and gravel were screened and placed in his own bunkers by the person there held to be a materialman, and that the contractor took the material from the bunkers and made his own delivery to the place where the material was to be used. In this case, by his contract, Harmon bound himself to deliver the material "on the work as directed and required," and also agreed to replace any material which might be rejected by the city engineer; but we think this does not alter the principle involved. In many cases, under modern conditions, materialmen deliver their material upon the works where it is to be used. In our cities, lumber and mill work are commonly delivered by the manufacturer to the place where they are to be put into the building, but that should be no reason for holding that the workmen employed by the mill are, if not paid their wages by their employer, entitled to file a lien against the build-

ing and the ground on which it stands. The same illustration applies to the provision that the material shall be satisfactory to the city engineer, and if any be rejected, other and proper material will be supplied in lieu thereof without added cost. The city engineer occupied the position that an architect employed by the owner would occupy with reference to a building being erected by a private owner, and of course the architect may reject improper material without thereby absolving the materialman from his contract to furnish proper material, or changing a materialman into a subcontractor. Nor does the fact that Harmon gave a bond to insure performance of his agreement in anywise alter the situation. Analyzing the lien statute in the *Baker* case, Judge Ellis, speaking for the court, said:

"No lien is accorded for labor performed in the preparation of materials being furnished by the materialman, and at the instance of the materialman. This seems plain from the language of the first clause of the section. All doubt, if there could be any, is removed by the next clause of the same section, which makes only the contractor, subcontractor, architect, builder, or person having charge of the construction, the agent of the owner for the purpose of establishing the lien. The statutory agency is confined to the persons named. A materialman is not one of them. . .

"Betts merely furnished the sand and gravel used in the work, just as someone else furnished the cement, and still another the steel. If he was a subcontractor, then every materialman would fall within that class and the distinction manifestly intended by the statute would be obliterated. He was not a statutory agent of the owner by any construction of the statute, however liberal. To hold that he was, would be to legislate and not to construe."

The giving of a bond on a contract to perform public work is for the purpose of providing security for

those who would be entitled to a lien if the work were private, and to claim under such bond one should be in a position to protect himself by a lien if the work were private in its nature. *American Sav. Bank & Trust Co. v. National Surety Co.*, 104 Wash. 663, 177 Pac. 646. And therefore if one employed by a materialman may not claim a lien when the work is of a private nature, he cannot claim under the bond given where the work is public. In the *Baker* case the subcontractor is defined as "one who takes from the principal contractor a specific part of the work," which definition seems to be in accord with the earlier case of *Young Men's Christian Association v. Gibson*, 58 Wash. 307, 108 Pac. 766. In *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083, it was said:

"If one who furnishes the sashes, doors and glass for a building is a subcontractor, every materialman would fall in that class, and such construction would nullify the plain terms of the statute. The argument that the contract to furnish the material is an entirety, and that it is difficult to comply with the statute, is one that should be addressed to another department of the state government."

In other jurisdictions, there may be other rules, but under the rule established in this state, Harmon was a materialman; and appellants, being his employees, had no right under the bond, just as they would have had no right of lien had the work been other than a public one.

Appellants' second contention, that they should recover under the rule laid down in *Puget Sound State Bank v. Gallucci, supra,* appears to rest upon the theory that there is something in the language of the bond in excess of that required by the statute, or in the language of the contract, which applies to one performing labor for, or furnishing supplies to, a ma-

terialman. The holding of the *Gallucci* case is that the contract there considered required the contractor to pay all just debts, dues, and demands incurred in the performance of the work, and as the bank there suing had advanced money to the contractor with which he had discharged such debts, dues and demands, and as the bond guaranteed the faithful performance of all the provisions of the contract, therefore, the bank stood in the shoes of those whose claims its money had paid, and it might recover on the bond to the extent that it proved that its advances had paid claims which were protected by the bond.

We fail to see how this rule can help appellants, and fail to discover any language in the bond or contract which, by any reasonable construction, can be held to mean that the bonding company, the contractor, or either of them, has undertaken to pay the laborers or mechanics who are employed by a materialman. The contract, which has been liberally quoted, provides, of course, that the contractor shall furnish, at his own expense, all material, labor, etc., and shall show to the satisfaction of the city of Kent that all just debts due to laborers, mechanics, materialmen, and persons who have supplied the contractor or any subcontractor with material or goods entering into the work, have been paid; but, should the language be construed otherwise, it would not help appellants in this case, because, if truck hire owing by a materialman be in any way covered by the bond, it must be by reason of the language of the statute "and pay . . . all persons who shall supply such person or persons or subcontractor with provisions and supplies for the carrying on of said work." In *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575, we said:

"This question comes at least very near, if not quite, being answered in favor of respondent by our

decision in *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337, where it was held that a bond containing these conditions and given under this statute, secured the value of the services of teams with drivers furnished to the contractor by a third person. Some observations were there made likening such service to labor, but the real ground upon which the holding rests is that the furnishing of the services of teams and drivers was the furnishing of 'supplies,' within the meaning of the law and the conditions of the bond."

See, also, *Ledingham v. Blaine,* 105 Wash. 253, 177 Pac. 783, and *Bishop v. Ryan Const. Co.,* 106 Wash. 254, 180 Pac. 126. The statute covering the furnishing of supplies, Rem. Code, § 1159-1, reads:

"Every person, firm or corporation furnishing materials, supplies or provisions to be used in the construction, performance, carrying on, prosecution or doing of any work for the state, or any county, city, town, district, municipality or other public body, shall, not later than ten days after the date of the first delivery of such materials, supplies or provisions to any subcontractor or agent of any person, firm or corporation having a subcontract for the construction, performance, carrying on, prosecution or doing of such work, deliver or mail to the contractor a notice in writing stating in substance and effect that such person, firm or corporation has commenced to deliver materials, supplies or provisions for use thereon, with the name of the subcontractor or agent ordering or to whom the same is furnished and that such contractor or his bond will be held for the payment of the same, and no suit or action shall be maintained in any court against the contractor or his bond to recover for such material, supplies or provisions or any part thereof unless the provisions of this act have been complied with."

The record fails to show that any such notice was here given to the contractor, and no contention is made

that there was any attempt to comply with this statute. The judgment is affirmed.

HOLCOMB, C. J., MAIN, MOUNT, and MITCHELL, JJ., concur.

[No. 15937. Department Two. January 7, 1921.]

PETER VACHON *et al., Respondents,* v. XAVIER DITZ, *Appellant,* J. KOEBSCH, *Defendant.*[1]

APPEAL (418)—REVIEW—FINDINGS—ACTIONS AT LAW TRIED WITHOUT JURY. Findings of the trial court, sitting without a jury, will not be disturbed on appeal where there is a sharp conflict in the evidence, the trial court having seen the witnesses and observed their appearance and manner of testifying.

LIMITATION OF ACTIONS (72)—ACKNOWLEDGMENT — PART PAYMENT —PERSONS BY WHOM MADE. The statute of limitations commences to run against an account from the date of the last payment thereon, even though the parties to be charged went through voluntary bankruptcy and thereafter acknowledged the debt and made a payment thereon and thereafter orally, in clear and unequivocal language, promised to pay the balance of such indebtedness.

BANKRUPTCY (17) — DEBTS DISCHARGED — PART PAYMENT — NEW PROMISE—SUFFICIENCY. A new promise made after the filing of a petition in bankruptcy will revive the debt charged, where a clear unequivocal oral promise is made by the party to be charged.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 21, 1919, upon findings in favor of the plaintiff, in an action upon an open account, tried to the court. Affirmed.

Farrell, Kane & Stratton, for appellant.

Kerr, McCord & Ivey (*Wm. Z. Kerr,* of counsel), for respondents.

TOLMAN, J.—This action was brought by respondents as plaintiffs against the appellant Ditz, and one Koebsch, to recover upon an open account for goods

[1]Reported in 194 Pac. 545.

sold and delivered to them as co-partners, doing business under the name of Koebsch & Ditz. Koebsch was not served with process, and did not appear in the action. Ditz defended, and after a trial to the court sitting without a jury, judgment was rendered against him, from which he appeals.

The trial court found that the partnership, of which appellant was a member, between April 22, 1908, and May 27, 1908, purchased merchandise from respondents and became indebted to them on that account in the sum of $1,621.05; that there had been paid and credited on such indebtedness $697.50 by the co-partnership, and that the last item entering into such credit was paid on September 16, 1911.

The transaction took place in Alaska, where all of the parties then resided, and the statutes of the Territory of Alaska having been pleaded, the court found that the Alaska statute of limitations applicable would not bar an action on the account until the expiration of six years from the time the cause of action accrued, and that the time of the running of the statute must be computed from the date of the last payment. The court further found that the defendant co-partnership, and its members individually filed a petition in voluntary bankruptcy in the United States District Court of the Territory having jurisdiction, and such proceedings were had as resulted in the discharge of the co-partnership, and the co-partners individually, from all debts provable in bankruptcy which existed on the 5th day of May, 1909. No dividends were paid to creditors in such proceedings. And further, the court found that, in June, 1912, and again in June, 1915, and on a number of other occasions within six years immediately prior to the institution of this action, appellant Ditz orally promised respondents, in clear and un-

equivocal language, that he would pay the balance of such indebtedness.

There is an unusually sharp conflict in the evidence, and this appears to be peculiarly a case where the trial court, having seen the witnesses and observed their appearance and manner of testifying, had a decided advantage over this court, limited as it is to the written record; but, having studied that record and weighed all of the evidence as carefully as it is possible for us to do, we are satisfied that it does not preponderate against the findings of the trial court, and we therefore cannot disturb them.

The facts found dispose of the defense of the statute of limitations, because the action was commenced within six years from the date of the last payment; and that payment having been made by the co-partners, or by one with the consent and by the authority of the other, neither can now claim the protection of the statute.

It is vigorously contended that the action was barred by the discharge in bankruptcy, and it seems to be well settled that a partial payment made thereafter will not revive a debt discharged in bankruptcy. Remington, Bankruptcy, § 2716. It appears to be equally well settled, however, that a new promise made after the filing of the petition will revive the debt, and that such promise, if it be clear, distinct and unequivocal, is sufficient, even though it be oral. Remington, Bankruptcy, § 2718; 3 R. C. L. 326. The facts found on this issue dispose of this defense also. The judgment of the trial court is affirmed.

HOLCOMB, C. J., MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15913. Department One. January 8, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM A. WILCOX, *Appellant*.[1]

WITNESSES (126-1) — IMPEACHMENT — IRRELEVANT OR COLLATERAL MATTERS. In a prosecution for arson in the burning of a building by accused for the purpose of collecting the insurance, in which witnesses testified to a conversation in which accused proposed to burn the building, stating that he had had a fire at S. and had collected the insurance, after some difficulty, it is not error, after allowing accused to deny the conversation, to refuse to allow accused to explain the circumstances concerning the other fire; since that involved an issue foreign to the case.

CRIMINAL LAW (112)—EVIDENCE—OTHER OFFENSES — PROOF AND EFFECT. In a prosecution for arson, an objection to a paper on the ground that it tended to show a forgery by the accused, is not well taken where the evidence tended to show without dispute that the paper was signed by a third person and the only question in issue was whether such third person was authorized to sign another's name to the paper.

CRIMINAL LAW (358)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ACCUMULATIVE EVIDENCE. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, nor where the only purpose is to meet or discredit evidence produced at the trial.

SAME (356)—NEW TRIAL—DILIGENCE. A new trial will not be granted for the purpose of introducing evidence which plaintiff had ample opportunity to produce at the trial.

SAME (355)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE IN GENERAL—ARSON. In a prosecution of the president of a company for arson, evidence with reference to the financial condition of the company at all times known to the accused, cannot be newly discovered evidence.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 18, 1919, upon a trial and conviction of arson. Affirmed.

[1]Reported in 194 Pac. 575.

Morris & Shipley, for appellant.

Fred C. Brown and *John D. Carmody,* for respondent.

BRIDGES, J.—The appellant was charged by information with the crime of wilfully, unlawfully, and feloniously setting fire to and burning a certain sawmill building, belonging to the Wilcox Lumber & Logging Company, located in King county, Washington. The jury returned a verdict of guilty, and from sentence thereupon defendant has appealed.

Samuel C. Brown and Fred C. Pesha, as witnesses for the state, testified that they were interested with the appellant in the Wilcox Lumber & Logging Company; and that, a day or two before the fire, appellant had told them that the company was in financial straits and that one way of raising money would be to burn the mill and the lumber and collect the insurance, and that he, the appellant, would not be afraid to burn the mill for that purpose, and that he had had other fires and had succeeded in collecting the insurance, and that he had had one fire in Snoqualmie and had collected insurance, although he had had some trouble in doing it. The appellant, when on the witness stand, denied that he had any such conversation with these witnesses, except he admitted having told one of them he had had a fire in Snoqualmie, where a part of his furniture had been destroyed. His counsel then sought to have him explain the circumstances surrounding the Snoqualmie fire, which, upon objection, the court refused to permit. Appellant then offered to prove that he did not himself start the Snoqualmie fire, but that it started in a mill close by his house and thus spread to and destroyed his furniture. The court refused to permit this testimony to go to the jury, and the appellant claims error on that account.

We are satisfied that these rulings were correct. All that Pesha and Brown had testified to was what they claimed the appellant had told them. He was permitted to, and did, deny these alleged conversations. It was, therefore, wholly immaterial as to how the fire at Snoqualmie started. The only material thing was whether or not the appellant had with Brown and Pesha the conversations detailed by them. Evidence of this character would not have contradicted any testimony of the state and would have opened up a subject entirely foreign to the issues involved in this case.

Appellant further alleges error because the court received in evidence state's exhibit A. This instrument was a paper purporting to be signed by W. A. Wilcox, as president, and F. C. Pesha, as secretary of the Wilcox Lumber & Logging Company, and empowering Wilcox to collect, on behalf of the company, the insurance carried on the destroyed property. On cross-examination, the state's witness Pesha was asked if he had not authorized Mrs. Wilcox, the wife of the appellant, to sign his name to any papers which might be necessary in connection with the collection of the insurance. He denied having given any such authorization. Mrs. Wilcox testified that she was directly authorized by Pesha to sign his name to any necessary papers, and that, by virtue of such authorization, she did sign his name to the state's exhibit A. In this testimony she was supported by Mrs. Young. On cross-examination, the appellant testified that Pesha's name to this exhibit was signed by Mrs. Wilcox under an authorization from Pesha so to do. The state then offered the instrument in evidence as its exhibit A.

It is claimed by appellant that the introduction of this instrument permitted the jury to draw the inference that the defendant had been guilty of forgery,

and that this would create an undue prejudice in the minds of the jury against him. We cannot see any merit in this claim of error. Every person admitted that Pesha's name had been signed to this instrument by Mrs. Wilcox, and the only dispute was whether or not she had been authorized by him so to do. There was no claim of forgery and nothing in this connection which could prejudice the jury. It was only after considerable testimony on this subject had been received without objection, much of which came from the appellant himself, that the instrument was offered and received in evidence. The proof of the execution of the instrument being in, it was entirely proper to receive the instrument itself.

It is next claimed that the court should have granted a new trial because of newly discovered evidence. In order to discuss this question intelligently, it will be necessary to refer briefly to portions of the testimony.

Brown had testified that there were two fires, one the night of the 21st of April, and the second the night of April 22, and that, when he was in the boiler room of the mill, between eleven and twelve o'clock at night of April 21, he saw the appellant set the first fire to the upper portion of the mill building. Appellant denied that the first fire was at the time fixed by Brown, and swore it was about six or seven o'clock of the morning of the 22d. He brought two or three witnesses to support him in this regard. He further testified that he was at home at the time Brown swore he saw him set the first fire, and he brought two or three witnesses to support him in this statement.

Some of the alleged newly discovered evidence is shown by the affidavit of one P. J. Concannon to the effect that Brown had told him that the fire in the mill occurred at about seven o'clock in the morning, and not between eleven and twelve o'clock the previous

night, and that Brown had further told him that he did not know how the fire started, and that appellant had helped him put it out.

In his affidavit, one A. G. Morrison, says he would testify that Brown was at his place of business, near the mill, from ten to twelve o'clock of the night of April 21, the time fixed by Brown when he saw the appellant set the fire. This testimony would, of course, contradict that of the witness Brown to the effect that the first fire started between eleven and twelve o'clock and that he had seen appellant set that fire. But this testimony would be merely cumulative. Several of appellant's witnesses had testified to substantially the same things. They had sworn that the fire did not occur when Brown had said it did; they had sworn that Brown did not see appellant set the fire, because the latter was at home all that night. Under these circumstances, it cannot be said that were there a new trial the result would probably be different.

This court has uniformly held that a new trial cannot be granted on the ground of newly discovered evidence when such new evidence is merely cumulative of that introduced at the trial; nor where the only purpose of such evidence is to impeach or discredit evidence produced at the trial. *O'Toole v. Faulkner,* 34 Wash. 371, 75 Pac. 975; *Orr v. Schwager & Nettleton,* 74 Wash. 631, 134 Pac. 501; *State v. Hodoff,* 88 Wash. 413, 153 Pac. 377.

Further alleged newly discovered evidence is shown by the affidavit of one B. H. Hadley, to the effect that he was familiar with the construction of the mill at the time of the fire and that it would have been impossible for the witness Brown to have seen, while he was in the boiler room, appellant on the upper floor. A new trial cannot be granted on such grounds as this.

The appellant, during his trial, had ample opportunity to introduce testimony of this character, and not having done so, he cannot now complain.

The remainder of the newly discovered evidence is with reference to the financial condition of the Wilcox Lumber & Logging Company. The appellant, who was the president and chief man in this company, must have known at the time of the trial all about the financial condition of his company and its business prospects, and if testimony of the character mentioned would have been of assistance to him, it was his privilege and duty to have introduced it then. It cannot be considered newly discovered evidence. If new trials must be granted for reasons such as these, there would be no end to a lawsuit. The record indicates that appellant had a full and fair trial. The judgment is affirmed.

HOLCOMB, C. J., MACKINTOSH, FULLERTON, and PARKER, JJ., concur.

[No. 16014. Department One. January 8, 1921.]

NEAL W. GILL, *Appellant*, v. C. B. PARRY *et al.*, *Respondents*.[1]

INFANTS (14)—CONTRACTS—REPUDIATION—ESTOPPEL. Under Rem. Code, § 5294, providing that a minor cannot disaffirm his contracts where on account of his own misrepresentations or having engaged in business, the other party has good reason to believe him capable of contracting, a minor is estopped from denying liability where he had accumulated $800, made his own contracts, collected his own wages and did his own banking, and the other party had no reason to believe that he was a minor.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 29, 1920, upon find-

[1]Reported in 194 Pac. 797.

ings in favor of defendant, in an action for money paid, tried on the merits to the court. Affirmed.

J. E. McGrew, for appellant.

Hartman & Hartman, for respondent Northwestern Trust & Savings Bank.

Jones, Riddell & Brackett, for respondent Hosner.

BRIDGES, J.—C. B. Hosner and W. O. Hinkley each owned an undivided one-half interest in a garage in the city of Seattle. Hinkley, desiring to leave the city, employed respondent Cole, doing business as the Reliable Investment Company, to find a purchaser for his one-half interest. The appellant, Neal W. Gill, seeing in the newspapers an advertisement concerning the sale of this one-half interest, called at the office of the Investment Company for the purpose of investigating the proposition. There he first met with the defendant C. B. Parry, who was in the employment of the Investment Company, and after talking the proposition over, Parry and Gill visited the garage in question. The next day Gill again visited the garage. Gill agreed to purchase Hinkley's undivided one-half interest for $850. Hosner had no interest in the transaction except that Hinkley had given him authority to sell and collect the purchase price. Gill, being without much cash, was desirous of disposing of two liberty bonds, each of the face value of $500, for the purpose of raising money to pay the purchase price of the garage. These bonds were registered in Gill's name and belonged to him. He signed them and turned them over to Cole. They then went together to the respondent, Northwestern Trust & Savings Bank, at Seattle, for the purpose of disposing of the bonds. The result was that the bank purchased them for $931 and turned the money over to Cole, who deposited the same to his own account in an-

other bank and gave Gill his check for $81, being the balance between the purchase price of the garage and the amount of money received for the bonds.

Gill was given a bill of sale to the one-half interest he had purchased and later he caused it to be filed and recorded in the auditor's office of King county.

After working around the garage for about a month, Gill claimed that he had been defrauded because of various misrepresentations made by Parry, Cole and Hosner, and sought to repudiate the deal he had made and to recover from the bank the bonds he had sold to it, or the value thereof. At the time of this transaction, Gill was a minor, being nineteen or twenty years of age. He lived with his mother in Seattle, but for a long time prior to this transaction he had been employed in various occupations in the states of Oregon and Washington, and had accumulated something like $800 out of his wages, with which (his mother adding a small amount thereto) he had purchased the above mentioned bonds. He made his own contracts of employment and collected his own wages, paid his own expenses and did his own banking. He testified that he had told Parry, Cole and Hosner that he was under age; but Cole and Hosner denied this statement, and each testified that he had assumed throughout the transaction that Gill was of age. It appears that Parry was not served with process and did not appear as a party or witness.

The chief misrepresentation charged in the testimony was that Parry, the agent and employee of the Investment Company, and Cole had represented to Gill that the garage was making about $12 a day clear, when, as a matter of fact, it was not making that sum or any amount clear. There is also some testimony to the effect that the property was not worth more than one-half as much as Gill had paid for it, or as Parry and Cole had represented to him it was worth.

Gill seeks to recover on two distinct grounds: (1) on account of fraud and misrepresentation, and (2) on account of his minority.

As to the bank, it appears that the sale of the bonds was the usual business transaction and the bank was not told, nor had it any information to the effect, that Gill was a minor. It knew, of course, that the bonds were or had been his property because they were registered in his name. But the testimony shows, and the trial court so found, that Gill signed these bonds and delivered them over to Cole before they went to the bank, and that the latter purchased the bonds of Cole and paid him therefor. It had no transactions whatsoever directly with Gill.

While it is the general rule that infants may avoid their contracts, our statute has considerably mellowed the rigorous common law rules in this regard. Section 5293, Rem. Code, provides for disaffirmance by a minor of contracts made by him, and § 5294, provides that:

"No contract may be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party has good reasons to believe the minor capable of contracting."

It thus appears that, for several reasons, the minor is not entitled to any relief from the respondent bank.

Nor is there anything to show that he is entitled to any relief from the respondent Hosner. The latter was in no wise interested in any part of the transaction except to act as agent for Hinkley in transferring the title to his interest in the garage to any purchaser and receive the sale price. The testimony wholly fails to show that he made any representations to Gill concerning the property, except that Hinkley was the owner of the undivided one-half interest being sold. Nor does the

testimony show that Hosner knew or had reason to believe that Gill was a minor. What we have already said about the minor disaffirming his contract applies to his transaction with Hosner.

Nor can there be any recovery against Cole or the Investment Company. It is true, the minor testified that he told Parry, Cole's agent, and Cole that he was a minor, but this is denied and the trial court found with Cole in this regard. In fact, the court expressly found that all the defendants believed that Gill was capable of making a contract. There was ample proof to support these findings, and we will not interfere with them. What we have said before concerning this minor disaffirming his contract applies to respondents Cole and the Investment Company. It follows that Gill cannot disaffirm on account of his minority.

But he claims that Parry and Cole told him that the garage was making twelve dollars per day clear, and that they represented to him that the half-interest he was buying was worth all he was paying for it, and he claims these representations were false. But Cole denied that these representations were made, and in addition sought to show that, if made, they were true. The trial court found with Cole on all these questions. He found that there had not been any misrepresentations or fraud, and that the property was actually worth what was paid for it. There was ample proof to support these findings.

A careful reading of the testimony convinces us that the court was right when it refused to permit any recovery. Judgment affirmed.

Holcomb, C. J., Mackintosh, Fullerton, and Parker, JJ., concur.

[No. 16024. Department One. January 8, 1921.]

CLARENCE R. ANDERSON, *Respondent*, v. PANTAGES THEATRE COMPANY, *Appellant*.[1]

THEATERS AND SHOWS — EXCLUSION OF PERSONS BY REASON OF COLOR—LIABILITY. Under Rem. Code, § 2686, making it a misdemeanor to deny to any person because of race, creed or color, the full privileges of any place of public resort or amusement, the proprietor of a theater cannot refuse to admit a negro to box seats and require him to take seats in the balcony; and a negro wrongfully discriminated against has his civil remedy in tort therefor.

STATUTES (93-96) — PLEADING — NECESSITY OF PLEADING GENERAL STATUTE. Rem. Code, § 2686, making it a misdemeanor to deny to any person because of race, creed or color, the full privileges of any place of public resort or amusement, being a general and not a special statute, need not be specially pleaded in an action to enforce a civil remedy for wrongful discrimination.

TORTS (1)—ACTS CONSTITUTING. The gravamen of an action for wrongfully discriminating against a negro by excluding him from seats in a theater, that he had purchased, contrary to the mandate of a statute, is in tort.

DAMAGES (18, 19)—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES—ANXIETY OR MENTAL DISTRESS—HUMILIATION. Compensatory damages may be recovered in an action for wrongfully excluding a negro from seats in a theater, for the personal indignity inflicted and the mental suffering from the feeling of humiliation and disgrace engendered.

SAME (90)—INADEQUATE AND EXCESSIVE DAMAGES—TO REPUTATION AND FEELINGS. A verdict for $300 for indignities inflicted in excluding a negro from seats in a theater will not be held excessive, where it occurred at a public place in the presence of a large number of people and was of an aggravated sort.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 20, 1920, upon findings in favor of plaintiff, in an action in tort, tried to the court. Affirmed.

[1]Reported in 194 Pac. 813.

Ryan & Desmond, for appellant.

Clarence R. Anderson and *Robert F. Sandall,* for respondent.

FULLERTON, J.—The appellant, Pantages Theatre Company, is a corporation organized under the laws of the state of Washington, and owns and conducts a theatre in the city of Seattle. A fee is charged for the privilege of witnessing the performances conducted in the theatre, varying in amount owing to the location of the seats selected. The respondent, Anderson, is a colored man, a lawyer by profession, engaged in the practice of law in the city named. On the day of July 7, 1919, a friend of the respondent caused to be purchased three tickets of admission to box seats in the theatre of the appellant for a performance to be given therein in the evening of that day. At the appropriate time, the respondent and two other persons, also colored, presented themselves for admission to box seats in the theatre, at the same time presenting the tickets as evidence of their right of admission. The attendant at the door refused them admission, telling them that all of the seats such as were called for by their tickets were taken. The respondent, who seems to have acted as spokesman for the party, questioned the truth of the statement, whereupon another attendant was called who repeated the statement. On further insistence on the part of the respondent, he was told that he could not be admitted to that part of the theatre in any event, but that he could return his tickets for the box seats and procure tickets for seats in the balcony of the theatre. As to what subsequently followed, the evidence is conflicting, but the court found, and we think the weight of the evidence supports the finding, that the attendant became gruff and insulting in his language, saying to the respondent that

he was not admitted because he was a colored man, and that

"none of his kind of people could sit in any box seat or on the ground floor of that theatre, . . . and did rudely, using no undue force and doing the plaintiff no bodily injury, all without any provocation whatever, push, shove, jerk and force plaintiff through a crowd of people who were standing in the lobby of the theatre out upon the sidewalk in the front of said theatre."

The court further found that the respondent conducted himself in a seemly and gentlemanly manner, and that he was refused admission to the seat called for by his ticket solely because he was colored and not because no seats were then available; that it was the policy and practice of the management of the theatre to refuse admission to box seats, seats in the loges, and seats on the ground floor of the theatre to all colored people, and to all orientals, and to all persons whose dress or physical appearance might render them obnoxious to other patrons of the theatre. There is no evidence, however, that there was anything in the respondent's dress or physical appearance that would bring him within this latter class. On the contrary, it seems to be conceded that he was "immaculate, neat and dapper" in his dress and personal appearance.

In this action the respondent sought damages for the breach of duty of the appellant to admit him to the theatre; for the indignity and humiliation to which he was subjected; for injury to his standing in the community as a professional man; and for mental suffering and injury to his feelings caused by the appellant's act. The trial resulted in a judgment in respondent's favor in the sum of three hundred dollars.

The first matter to be noticed is the claim of the appellant to an absolute right to exclude the respondent from its place of business. Its contention is that

the proprietor of a theatre is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may consent to admit to it; that there is no duty, as in the case of a common carrier, to admit every one who may apply and be willing to pay the price of a ticket, for the theatre proprietor has acquired no peculiar rights from the state, and is under no implied obligation to serve the public; that it makes no difference in this respect whether he has theretofore sold the person seeking admission an admission ticket or not, as a ticket is a mere license, revocable at the will of the proprietor, even after the ticket holder has entered the theatre and has taken the seat therein that the ticket entitled him to take.

It is probable that the contentions of the appellant correctly reflect the rules governing in such cases as administered at common law; and if, as it further contends, we have no applicable statute on the matter, it was within its rights when it refused admission to its theatre to the respondent, and subjected itself in so doing to no greater liability than the liability of refunding the purchase price of the ticket. But these questions do not require examination at length. Contrary to the contention of the appellant, we think the legislature has enacted a statute applicable to the situation as here disclosed. It has provided (Rem. Code, § 2686) that:

"Every person who shall deny to any other person because of race, creed or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, shall be guilty of a misdemeanor."

This statute, while penal in form only, is both penal and remedial in its nature and effect. In addition to

providing for a criminal punishment of proprietors of such places for discriminating against the admission thereto of persons on account of race, creed or color, it confers rights upon the individual—it confers upon all persons, regardless of their race, creed or color, the right to be admitted to the places enumerated on equal terms with all others.

The person wrongfully discriminated against also has a civil remedy against the person guilty of the wrongful discrimination. A contrary contention was made under a similar statute in *Ferguson v. Gies*, 82 Mich. 358, 46 N. W. 718, 21 Am. St. 576, 9 L. R. A. 589. Answering the contention, the court said:

"But it is claimed by the defendant's counsel that this statute gives no right of action for civil damages; that it is a penal statute; and that the right of the plaintiff under it is confined to a criminal prosecution. The general rule, however, is that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent; . . ."

Mr. Justice Brewer, in the case of *In re Debs, Petitioner*, 158 U. S. 564, uses this language:

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to

indictment and punishment in a court of criminal jurisdiction."

It is true there is a difference between the act recited by the learned justice by way of illustration and the act before us, since in the one the act is an offense at common law while in the other the offense is of statutory creation. But we cannot conceive that this makes a difference in the applicable rules. Each act is a wrong against the individual, and wrongs are equally wrongs whether in violation of rights conferred by the common law or in violation of rights conferred by statute. It will be noticed, also, that the justice does not confine the rule to the particular instance cited or instances of a similar nature, but, on the contrary, says that the same rule is applicable to "all other offenses which cause injury to person or property."

The appellant makes the further contention that the statute cited is not applicable to the present case for the reason that it was not pleaded. With this we cannot agree. It is a general rule, no doubt, that a special statute on which a plaintiff must rely in order to maintain his cause of action must be specially declared upon by him, but the rule has no application to a general statute. Statutes of the latter sort are a part of the law of the land as much so as is the common law, and a plaintiff relying thereon has only to plead the facts bringing his case within the rule of the statute in order to state a cause of action within it. The statute here in question is a general, not a special statute, and hence no pleading, other than a pleading showing facts within the prohibition of the statute was necessary in order to bring it to the judicial knowledge of the court. The rule is stated in 36 Cyc. 1237, in the following language:

"Where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it; and it is not necessary to recite the title of the act or otherwise designate or even refer to it."

Our own case of *Seattle v. Pearson,* 15 Wash. 575, 46 Pac. 1053, is in point in principle. There we held that "it is not necessary to plead an ordinance by title, number and date of passage in a complaint filed in a court of the municipality, as it is the duty of such court to take judicial notice of the ordinance."

The rule of the case of *Flessher v. Carstens Packing Co.,* 81 Wash. 241, 142 Pac. 694, cited and relied upon by the appellant, is not contrary to the rule we here announce. It was not there held that the question at issue was not within the statute because the statute was not specially pleaded, but was so held because the issues as framed did not bring the case within the statute.

The further contention is that the damages awarded by the court are excessive. It is argued that the action is not founded on tort, but upon a breach of contract, and that for a breach of contract the measure of damages is the pecuniary loss, suffered because thereof, hence personal indignities, humiliation, sense of personal wrong, and mental suffering cannot be taken into consideration in measuring the damages suffered.

If the premise here assumed be correct—if the action has its foundation in breach of contract solely—it is possible that the deductions drawn therefrom would follow. But we cannot assent to the conclusion that the basis of the action rests in breach of contract. Since the respondent was the lawful possessor of a ticket entitling him to a choice of the unoccupied seats in a certain part of the theatre, and since the appellant

refused him admission thereto when he applied for admission, the action has in it the element of breach of contract, but this is not the gravamen of the charge. The cause of complaint is that the appellant, contrary to the right of the respondent and contrary to the positive mandate of the statute, refused the respondent admission to its place of amusement solely for the reason that he belonged to a colored race. This was a tort and an action founded thereon lies in tort. The wrong would have been the same had the respondent applied to purchase a ticket and had been refused. In other words, the respondent has a cause of action because he was denied a right which the law specially confers upon him, and which the appellant could not deny without the breach of a public duty the law enjoins upon it. The fact that the respondent had a ticket entitling him to admission does not change the cause of action from one in tort to one in contract.

But it is said that there was no personal injury inflicted upon the respondent, and hence there can be no recovery for anything other than the breach of the contract. But this is not the rule. The act alleged in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages for which a compensatory award may be made. This we have held since the early history of the court. *Cunningham v. Seattle Elec. R. & P. Co.*, 3 Wash. 471, 28 Pac. 745; *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Davis v. Tacoma R. & P. Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Ott v. Press Publishing Co.*, 40 Wash. 308, 82 Pac. 403; *McClure v. Campbell*, 42 Wash. 252, 84 Pac. 825; *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172; *Nordgren v. Lawrence*, 74

Wash. 305, 133 Pac. 436; *O'Meara v. Russell,* 90 Wash. 557, 156 Pac. 550, L. R. A. 1916 E 743.

But it is said that the cases of *Corcoran v. Postal Telegraph-Cable Co.,* 80 Wash. 570, 142 Pac. 29, L. R. A. 1915 B 522, and *Kneass v. Cremation Society,* 103 Wash. 521, 175 Pac. 172, are contrary to and in effect overrule the foregoing cases. We cannot so read them. An examination of the first of the cases will disclose that the cited cases were practically all referred to therein and distinguished from the case then under consideration; the distinguishing features pointed out being that the cited cases either carried with them the element of an assault upon the person or were willful violations and physical invasions of the rights of the injured party, features not presented in the case in hand. The second case has other distinguishing elements; but it was likewise distinguished from the cited cases for the reasons stated in the case of *Corcoran v. Postal Telegraph-Cable Co., supra.*

Since we conclude that the respondent was entitled to recover for the personal indignity inflicted upon him and the consequent feeling of humiliation, disgrace, and the attendant mental suffering, it remains to inquire whether the damages assessed are too large, taking into consideration these elements of damage. The amount of the recovery is less than the recovery we permitted to stand in the somewhat similar cases of *Cunningham v. Seattle Elec. R. & P. Co.,* and *Willson v. Northern Pac. R. Co.,* before cited, and is the same in amount as was awarded by another court under precisely similar circumstances. See *Joseph v. Bidwell,* 28 La. Ann. 382, 26 Am. Rep. 102. The amount of an award in such cases is, of course, incapable of yardstick measurement; at best it is but an estimation which must depend on the circumstances of the particular case. Here the indignity was of an aggravated

sort; it occurred at a public place and in the presence of a large number of people. We think the award is not disproportionate to the proofs and should be allowed to stand.

The judgment will stand affirmed.

HOLCOMB, C. J., MACKINTOSH, BRIDGES, and PARKER, JJ., concur.

[No. 15948. Department Two. January 8, 1921.]

O. H. ANDERSON, *Appellant*, v. W. G. McLAREN *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS (389, 390)—STREETS—AUTOMOBILE COLLISION—EVIDENCE—SUFFICIENCY. It is error to dismiss an action for damages to plaintiff's automobile which was bumped by defendant while it was parked at the curb where it had a right to be, where the evidence tended to show that defendant's car could and should have been stopped in time to avoid the collision, if defendant was driving as slowly as she claimed and had not been confused and lost control of herself and of her car.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 1, 1919, upon findings in favor of defendants, in an action for damages sustained in an automobile collision, tried to the court. Reversed.

Roberts & Skeel and *L. B. Schwellenbach*, for appellant.

James B. Murphy, for respondent Model Transfer Company.

Farrell, Kane & Stratton, for respondents McLaren.

HOLCOMB, C. J.—Through no fault of his, appellant's car, while standing lengthwise alongside the curb, on the west side of Sixth avenue, Seattle, sixty feet north

[1]Reported in 194 Pac. 828.

of the Union street intersection of Sixth avenue, was run into by a car driven by Mrs. McLaren and owned by respondents McLaren. The accident occurred on the afternoon of April 14, 1919. Appellant's car was unoccupied and motionless. He had the right to stand his car in that location.

Mrs: McLaren drove into the car of appellant while trying to avoid a collision with a Ford truck owned by the other respondent, the Model Transfer Company of Seattle, which was being driven out from the curbing on the east side of Sixth avenue across the street between street intersections, until it crossed half, or a little over half, the width of the street. The street was forty-two feet wide and was paved.

The trial court found and concluded that neither respondent was negligent; that the accident occurred through the fault of nobody; that the action should be dismissed with prejudice; and that the innocent owner of the bystanding car should pay the costs of the defenses. His motion for a new trial having been unsuccessfully made, appellant prosecuted this appeal from the judgment of dismissal entered by the trial court.

On the east side of Sixth avenue, and at a point nearly opposite the place where appellant's automobile was standing, the Ford truck, owned and operated by respondent Model Transfer Company was backed up against the curb. Mrs. McLaren was driving her Dodge touring car north on the east side of Sixth avenue. She proceeded across the Union street intersection at a speed of about ten or twelve miles an hour. When she was somewhere between this street intersection and the place where the Ford truck stood, Nissen, the driver of the truck, started it out from the curb against which it had been backed.

The testimony of Mrs. McLaren and of Mrs. Parker, who was riding with her in the Dodge automobile, was to the effect that several other Ford trucks were standing against the curb on the east side of Sixth avenue between Union street and the place where the Ford truck came out. That there were any other automobiles standing along this place, is denied by the driver of the Ford truck and the young man riding with him. There was at least one automobile, and perhaps others, on the opposite, or west, side of Sixth avenue, near appellant's car. The driver of the Ford truck started it out from the curb at about the time that Mrs. McLaren reached the street intersection, from sixty to seventy-five feet away from him. He says he saw her car at this distance and that, inasmuch as, according to his testimony and that of his companion on the truck at that time, there were no other cars along the curb south of him to the Union street intersection, she had a clear view of his car as it started out. Mrs. McLaren testified that she did not see the Ford truck until her car was within about ten feet of it, she and her companion claiming, as already noticed, that other trucks were standing just south of the Ford truck in question. The truck driver testified that, after the truck had proceeded about six feet out from the curb, he stopped it to allow Mrs. McLaren to go ahead of him; that she turned as if to pass in the rear of the truck, and he started ahead again to give her room to do so; that she then swung her car to the west with the intention of going ahead of him, so he stopped the Ford truck again; and that her car crashed into appellant's Buick car.

Mrs. McLaren's version of what occurred was to the effect that she was driving north along the east side of Sixth avenue, close in to the other trucks, which she says were standing there (and which Nissen de-

nies), when for the first time she saw the Ford truck driven by Nissen as it started out from the curb; that she was at that time about ten feet from this truck; that she thought that, if she did not turn she would strike the truck and perhaps she and Mrs. Parker would be killed, so she swerved to the west, or left; that she saw a number of cars standing on the west side of Sixth avenue and knew that, in swerving to the left, she had to hit one of them; that, immediately upon seeing the Ford truck, she applied her brakes, then swerved to the left and collided with appellant's car.

Mr. Wolff, a witness called by appellant, testified that, just before the accident, he had driven his car up behind appellant's car and parked it there; that he happened to look up and see the Ford truck coming out from the curb on the other, or east, side of the street, and the Dodge car driven by Mrs. McLaren as it came up the street on the east side; that the two cars were close to each other when the one backed and the other swerved over, as already related.

Mrs. Parker said that the distance from where the Ford truck came out in front of the McLaren car to the place where appellant's Buick car stood was about fifteen feet; that she thought Mrs. McLaren could have stopped her car within a distance of ten feet if it had not been for the down grade of the street at the point where the accident occurred; that,

"We (the McLaren car) bumped this Buick slowly. It was due to the momentum of her car, but the car being against the curb and our car moving—the impact was hard on the Buick."

The record shows that there is a down grade of 5.6 per cent on Sixth avenue from Union street north to Pike street; that the curb at the northeast corner of Sixth avenue and Union street is one foot higher than

the intersection of the curbs at the northwest corner of those thoroughfares.

Nissen and Smith—Smith was the young man who was riding on the truck with Nissen at the time of the accident—were qualified as expert witnesses, and testified that, assuming that Mrs. McLaren was driving north on Sixth avenue at about ten miles an hour, that there was a down grade to the north of 5.6 per cent, that the west curb was a foot lower than the east curb, that the pavement was dry, and that the brakes on the McLaren car were in good condition (as Mrs. McLaren testified they were); then, under such circumstances, the Dodge car could have been stopped in about twelve or fifteen feet.

The testimony went to show that, just before the collision, Mrs. McLaren was driving her car at the rate of about ten miles an hour. She herself testified that she was positive that her car was not going more than ten miles an hour. She was on the east side of the street, according to her own and other testimony, at the time she first saw the Ford truck, and about ten feet from it, as she says. Moreover, appellant's car was on the opposite, or west, side of the street, and a little to the north of her car. Under such circumstances, her car must have been at least twenty feet from appellant's car, if not farther. This distance, according to the undisputed testimony of Nissen and Smith, was more than sufficient within which she might have stopped her car by the prompt and proper use of her brakes, which she had testified were "working nicely."

Mrs. McLaren's testimony would indicate that she became confused. The conclusion is almost irresistible that she lost control of herself and of her car; otherwise, she had sufficient distance within which to stop her car before it should collide with appellant's car.

Allen v. Schultz, 107 Wash. 393, 181 Pac. 916; *Ebling v. Nielsen,* 109 Wash. 355, 186 Pac. 887.

We are satisfied, also, that the transfer company, through its driver, wrongfully set in motion the train of causes which combined to produce the damage, and cannot escape the consequences. The driver, Nissen, testified that, when starting out from the curb, with his twelve-foot truck cross-wise of the narrow street, he did not sound his horn, signal with his arm, or give any other warning. He said the reason he did not was that he was in plain view all the time. That may be true, but the testimony of other credible witnesses is that there were other trucks or cars backed up to the curb on the east side of Sixth avenue, and some of them between his car and the Union street intersection; so that one driving from that direction toward him might well believe that he would not start immediately or dart out at high speed in front of a closely approaching car.

Provisions of the city ordinance of Seattle, No. 37,434, relating to traffic are as follows:

"Sec. 31. Before turning, whether from a standstill or while in motion, stopping or decreasing speed, drivers shall give timely warning of their intentions to those following them, by outstretched arm or in some unmistakable manner."

"Sec. 21. A vehicle, except when passing the vehicle ahead, shall keep as near the right hand curb as practicable so as to leave the center of the street free and open for overtaking traffic."

"Sec. 52. No driver shall enter any street from any point other than a street intersection at a rate of speed faster than five miles per hour, nor without first attracting the attention of approaching pedestrians and vehicles."

Nissen violated all these traffic ordinances. He claims there was room behind him, when he reached

the center of the street, for Mrs. McLaren to pass between him and the curb; yet he admits that there was a Paige automobile parked by the curb at right angles to the street immediately to the right of the place where he had parked his car. That testimony is therefore highly improbable.

We therefore hold that each and both of the respondents contributed to the injury and damage.

There was not much contest over the actual damages. Appellant used his car as a means of transportation in his business as manager of a number of grocery stores. The injury necessitated repairs costing the undisputed sum of $194.65. As a result of the injury, his car was out of business and under repair for a necessary period of thirty-one days, during which time he was compelled to hire another car to take the place of his own; for which hired car he was compelled to pay seven dollars per day, or $217. The evidence as to depreciation in value of his own car after the injury and the necessary repairs, is uncertain.

We conclude that the judgment should be reversed, both respondents adjudged liable, jointly and severally, and that appellant shall recover of and from the community of respondents McLaren, and the Model Transfer Company of Seattle, a corporation, jointly and severally, the sum of $411.65, with costs of action and of appeal.

It is so ordered.

Mount, Mitchell, Tolman, and Main, JJ., concur.

[No. 16010. Department Two. January 8, 1921.]

E. C. KAUFMAN *et al., Respondents,* v. WILLIAM D. PERKINS *et al., Appellants.*[1]

HUSBAND AND WIFE (69, 70)—COMMUNITY PROPERTY—LEASES—ESTOPPEL TO ASSERT INVALIDITY. A wife is not estopped to contest the husband's extension of a lease of community property, made without her knowledge or consent, from the mere fact that she had always been satisfied to have her husband handle community affairs including the leasing of community real estate; in view of Rem. Code, § 5918, prohibiting the husband's conveyance thereof unless the wife join in executing the instrument.

SAME. The voluntary installation of coal burners, which were removed, and other expenditures required by the lease to be made by a lessee holding over under an authorized extension of a lease, do not constitute a part performance which would estop the wife from asserting the invalidity of the extension.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 28, 1920, upon findings in favor of the plaintiff, in an action for specific performance and to quiet title, tried to the court. Reversed.

Peters & Powell, for appellants.

Carroll B. Graves, for respondents.

HOLCOMB, C. J.—This action is for the specific performance of an alleged agreement for a five-year lease of community real property belonging to defendants.

Defendants appealed from the judgment of the trial court, decreeing specific performance, holding that plaintiffs were entitled to the occupancy of the premises as lessees thereof for a term of five years from November 10, 1919, quieting their interest and title in the leasehold for such period, and enjoining defendants from disturbing plaintiffs in the possession of the

[1]Reported in 194 Pac. 802.

premises as long as plaintiffs should perform the terms and conditions of the lease.

On April 23, 1914, defendants, who, as the owners of lot 11, block 16, of S. A. Bell's addition to the city of Seattle, were erecting thereon a building to be used as an apartment house, executed a lease of the premises to G. E. Sherwood and wife for a term of five years from September 1, 1914. This lease provided, however, that, in the event the building was not ready for occupancy by September 1, 1914, the lease should not begin to run until the building was ready, when the term should run for five years therefrom. In accordance with this provision, it was November 10, 1914, when the term began, and it was to run until November 10, 1919. On February 20, 1918, one Driscoll was the tenant, the property having passed to him through several hands. He was having financial difficulties and was unable to make certain needed improvements on the premises. Among other things, the installation of coal burners or furnaces was necessitated by the then existing oil shortage, notice having been given that oil would be discontinued. Driscoll thereupon gave up his tenancy, one R. L. Langer agreeing with appellant Perkins that he would take an assignment of the lease, and an extension thereof, for his brother, Roland G. Langer. Accordingly, Perkins sent the following letter:

"Seattle, Washington, February 20, 1918.

"R. G. Langer: We will draw up the necessary extension of the present lease of the Sheridan Apartments, or make out a new lease commencing November 10, 1919, for a period of two years at $9 per room, and the three following years at $9.50 per room; terms and conditions similar to the present lease, and the present mortgage on the furniture as security to be extended or arranged for by you.

WDP:A Yours truly, Wm. D. Perkins."

Thereafter appellants refused to enter into a formal agreement for the extension of the lease or the making of a new lease, in accordance with the terms and conditions of the letter in question, and notified respondents that they (appellants) would not be bound thereby and that respondents must surrender the premises on November 10, 1919. Respondents then brought the action for specific performance of the alleged agreement in question.

Various rulings of the trial court are assigned as error, but we think a decision as to whether the failure of Mrs. Perkins to sign or acknowledge the agreement for the extension of the old lease or the execution of a new one excused compliance therewith, or whether the circumstances of the case are such as to estop her from denying the validity of the agreement, will be conclusive of this appeal.

Mrs. Perkins testified to the effect that she had always been satisfied to have her husband handle community affairs, including the leasing of community real estate; and the question is, whether she is now estopped to deny his authority to represent her in this transaction. On this question of estoppel, respondents cite, among other cases, *Young v. Porter,* 27 Wash. 551, 68 Pac. 362, an action for specific performance of an oral agreement to convey an undivided half interest in certain real and personal property. Specific performance was there decreed, but, in order to show that there the facts were different in material respects from those of the instant case, we quote from the concluding portion of the opinion in that case as follows:

"So far as the personal property was concerned, it was simply an incident of the real estate; and, while the wife was not a party to the original agreement, the finding of the court is to the effect that it was at all times customary for the husband to personally con-

duct all community business of himself and wife. This he had a right to do under the law, so far as the personal property was concerned; and it was personal property which, under the agreement with the respondent, was invested in this pottery plant. She also knew of the position occupied by the respondent in relation to the property, for she joined with the respondent and her husband in the lease of the property. Other testimony in the case shows conclusively that she was cognizant of, and in effect consented to, the whole transaction."

It is plain that, on account of the difference in circumstances, that case has no bearing upon the case now before us.

On this question respondents cite, also, the case of *Washington State Bank of Ellensburg v. Dickson*, 35 Wash. 641, 77 Pac. 1067, another action to compel specific performance. Respondents here rely upon the language in that opinion where, referring to the contention that the contract for the conveyance of community property there under consideration was void because not signed by the wife, we said:

"But it is not the rule in this state that a contract for the sale of community real property must be signed by the wife in order to be binding upon her. We have held it enough if the contract, when made by the husband, had the sanction and approval of the wife, or if it was subsequently ratified by her." (Citing authorities.)

To distinguish the *Dickson* case from the one at bar, it is only necessary to set out the language of the opinion in the *Dickson* case immediately following the above quotation, as follows:

"Here there was both a previous authorization and a subsequent ratification. McCandless himself (the husband) testified that he had talked the matter over with his wife prior to entering into the contract, and that it was entered into with her knowledge and full

consent; and it will be remembered that she joined with her husband in a deed of the premises to the respondent."

It may be remarked here that Mrs. Perkins does not appear to have had any knowledge of the letter which is the subject of the present controversy.

Much reliance is placed by respondents on the case of *Zinn v. Knopes,* 111 Wash. 606, 191 Pac. 822; but we said there:

"The testimony shows that *the land was the separate property of the husband Henry Knopes, and that being true, if the lease was otherwise good, the fact that the wife had not joined in the execution of it is immaterial.*"

In the present case, the property belonged, of course, to the community consisting of appellants Perkins and wife.

Respondents also claim that the case of *Matzger v. Arcade Bldg. & R. Co.,* 80 Wash. 401, 141 Pac. 900, L. R. A. 1915 A 288, lends much support to their contention in respect to the question under discussion. There the lease in question was unacknowledged. It appears that the tenant there held the property under the lease for a considerable length of time. Equities were there shown to estop the denial of the validity of the lease. The *Matzger* case was later cited by us in the case of *Armstrong v. Burkett,* 104 Wash. 476, 177 Pac. 333, where the lessee sought to avoid the rule governing oral leases by setting up certain facts which she relied upon as creating an estoppel. We said in the opinion:

"The mere possession, the payment of rent and the conduct of a business in the usual way and for the sole benefit of the tenant, unaccompanied by circumstances which will create a consideration going to the term, will not make an oral lease from month to month a

term lease resting in estoppel." (Citing the *Matzger* case.)

Andersonian Inv. Co. v. Wade, 108 Wash. 373, 184 Pac. 327, was another case involving the question of estoppel; but, as to it, as well as to most of the other cases cited and discussed on this point, we say, in the language suggested by counsel for respondents, that:

"The numerous definitions of estoppel cannot be welded into a fixed rule of law. Equitable estoppel rests largely upon the facts and circumstances of each case. The cases themselves must be looked to and applied by way of analogy, rather than by rule."

In *Spreitzer v. Miller,* 98 Wash. 601, 168 Pac. 179, we cited the language of §5918, Rem. Code, to the effect that:

"The husband . . . shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife."

We then said:

"Hence it has consistently been held that a contract to lease community land, made by a married man without his wife joining him in the manner provided by the last quoted section, the lessee knowing of its community character, is clearly in contravention thereof." (Citing authorities.)

We quoted, with approval, the above language in the recent case of *Hinkhouse v. Wacker,* 112 Wash. 253, 191 Pac. 881, 195 Pac. 218.

Expenditures by respondents are also relied upon as part performance rendering the proposed extension of lease binding for the new term upon both spouses, citing *Matzger v. Arcade Bldg. & R. Co., supra,* which is

distinguished from this on the grounds stated in *Grubb v. House*, 93 Wash. 200, 160 Pac. 421:

"In support of this cause of action, the case of *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915 A 288, is cited; but that case is distinguishable. There 'A,' the tenant, at the time of making the lease, paid a consideration which went to the entire term in addition to the rental to be paid at stated periods throughout the term; 'B' put in a new front in the storeroom upon the faith of the lease; and 'C,' the manager of defendant company, recognized the lease as valid within one year prior to its expiration. In this case, no consideration was paid for the lease which went to the entire term, no recognition of the lease as valid was made within one year prior to its expiration, and no permanent improvement was made by the lessee . . .

"No authority has been presented which would sustain the proposition that the good will of a business may operate as a permanent improvement to the freehold so as to remove the bar of the statute of frauds. The very nature of the good will is such that it could not well be considered permanent."

Here, respondents entered into possession under the valid, unexpired lease, having eighteen months to run. The expenditures, except those for the coal-burning heaters, were such as the lessee had to make under the lease, except that interior painting was done instead of tinting; and the coal burners were voluntarily installed and are removable. Hence, such expenditures are not such as to constitute part performance and create estoppel, as in the *Matzger* case.

From the foregoing, it follows that the judgment of the trial court must be, and it is, reversed, with direction to enter judgment for appellants.

MOUNT, MITCHELL, TOLMAN, and MAIN, JJ., concur.

[No. 16076. Department One. January 8, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Fred C. Brown, Prosecuting Attorney, Respondent,* v. OTIS W. BRINKER, *Justice of the Peace, et al., Appellants.*[1]

CRIMINAL LAW (380)—CERTIORARI (11)—NATURE AND GROUNDS—REVIEW OF DECISION OF JUSTICE COURT—DISMISSAL OF CRIMINAL CASE. Certiorari lies at the instance of the state or city to review the action of a justice of the peace in sustaining a demurrer to a criminal complaint for the violation of an ordinance and dismissing the accused, under Rem. Code, § 1002, authorizing a writ of review to review illegal acts or correct an erroneous proceeding not according to the course of the common law where there is no adequate remedy at law.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 14, 1920, reversing the judgment of a justice of the peace, upon review by writ of certiorari. Affirmed.

Walter M. Harvey, for appellants.

Fred C. Brown and *Chester A. Batchelor,* for respondent.

MACKINTOSH, J.—F. W. Rinkenberger was charged in the justice court before Otis W. Brinker, justice of the peace in and for Seattle precinct, King county, with the crime of giving a false certificate of death. Rinkenberger appeared and demurred to this criminal complaint on the ground that it did not state facts sufficient to constitute a crime. The justice of the peace sustained the demurrer, dismissed the case and discharged the defendant. Thereafter the prosecuting attorney of King county began this action of certiorari in the superior court of King county, asking for a writ of certiorari to review the action of the justice of the

[1]Reported in 194 Pac. 574.

peace. The justice of the peace made return thereto, and, after the hearing, a peremptory writ of review was issued. From this final order, Rinkenberger and the justice of the peace have appealed.

The point presented is whether the state can, by writ of certiorari, review the action of a justice of the peace in a criminal proceeding where the defendant has been discharged on an issue of law.

The state has no appeal from a justice court in any criminal proceedings, but claims the right to certiorari under § 1002, Rem. Code, that section being:

"A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law."

The general rule is that, in the absence of express statutory authority permitting it, the state, in criminal proceedings, has no right of appeal, nor the right to review of a decision or judgment in a criminal case after final judgment has been rendered in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal or upon the determination by the court of an issue of law. From the great number of cases that have decided this point, the one of *United States v. Sanges,* 144 U. S. 310, probably is as exhaustive and enlightening as any. The general rule which has restricted the state has been applied to the situation in regard to violation of criminal ordinances, and on this point the case of *Portland v. Erickson,* 39 Ore. 1, 62 Pac. 753, decided by the supreme court of Oregon, is probably the best considered case.

This question, however, was before the supreme court of this state several years ago, and a holding was there made which is contrary to the rule just announced. In the case of *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053, the defendant Pearson was prosecuted in the municipal court of the city of Seattle for a violation of one of the city ordinances. He appeared and demurred to the complaint for the reason that the ordinance was invalid. Being successful in his contention, the defendant was discharged, and thereafter the city of Seattle applied to the superior court of King county for a writ of certiorari to review this act of the municipal judge, and a hearing was had upon the writ in the superior court, and that court held the ordinance to be valid, and from that decision an appeal was taken to this court, which said:

"The first contention of the appellant is that certiorari does not lie in a case of this kind; that the ordinance, being *quasi* civil in its nature, the respondent, the city of Seattle, had a remedy by appeal. We think, under the best authorities, this is not a *quasi* civil action, but that it is either criminal or *quasi* criminal. This view is sustained by § 411, 1 Dillon on Municipal Corporations (4th. ed.), although there seems to be some conflict in the authorities cited. But under the provisions of ch. 54, Laws of 1891, p. 91, and of § 4, ch. 65, of the Laws of 1895, p. 115, and under the authority of *Woodbury v. Henningsen*, 11 Wash. 12 (39 Pac. 243), we think it is clear that the writ was properly issued in this case." (Section 4, ch. 65, p. 115, Laws of 1895, is now § 1002, Rem. Code.)

Upon its facts, the *Pearson* case cannot be distinguished from the present case. Both cases involved criminal proceedings, the fact that one may have been prosecuted by the city under a municipal ordinance and the other by the state under statute does not alter the situation. *Portland v. Erickson, supra.* Nor does

the fact that one was prosecuted in the municipal court and the other in the court of the justice of the peace, both being inferior jurisdictions that come within the purview of § 1002, Rem. Code, *supra.*

The difference existing between the decision in the *Pearson* case and the general rule may be due to the peculiar statute of this state on the subject of certiorari. In referring to our statutes, the editors of Corpus Juris, in dealing with the subject of Certiorari, vol. 11, p. 98, say:

"In Washington the statute authorizes the writ in case of (1) excess of jurisdiction, or (2) illegal acts, or (3) to correct any erroneous or void proceeding, or (4) to review a proceeding not according to the course of the common law, provided in all such cases that there is no appeal nor any plain, speedy, and adequate remedy at law. This statute seems to follow the New York statute in many respects, and is broader than in any of the other states where certiorari is called a writ of review."

For the reason that our statute is, as noted, broader in its scope and operation than that of other states, certiorari is permissible on behalf of the state or municipality to review the actions of the inferior courts, that is, municipal or justices' of the peace courts, where, in criminal proceedings, those courts have discharged persons charged with crime, either by erroneously setting aside the complaint, or in arresting judgment on the ground that the facts stated in the complaint did not constitute a crime, or by committing some other material error in law not affecting the acquittal of a prisoner on the merits. The rule in the *Pearson* case having been the rule of this court for many years, the judgment appealed from is affirmed.

HOLCOMB, C. J., BRIDGES, FULLERTON, and PARKER, JJ., concur.

[No. 16048. Department Two. January 8, 1921.]

In the Matter of the Estate of MARY H. ABRAMS. VASHTA MCCLURE, *Appellant,* v. ROBERT ABRAMS, *etc., et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS (3, 156) — SALES — POWERS AND JURISDICTION OF COURT UNDER NONINTERVENTION WILL. The probate court has authority to order a sale of real estate upon public notice, upon application of the executor of a nonintervention will, in view of Laws of 1917, p. 684, § 146, providing that an executor of a nonintervention will *may* sell property without order of court if authority is given in the will, and p. 706, § 219, declaring the intention to authorize the courts in probate to settle estates, and § 220, providing that, in exercising the jurisdiction and powers granted, the court may give such notice as may be considered proper or necessary.

WILLS (75)—CONSTRUCTION—ESTATES IN TRUST—POWER OF DISTRIBUTION—LIMITATION AS TO TIME—EFFECT. Failure of executors to sell property within the five years fixed in a will will not terminate the trust, where the property was devised in trust for named devisees, and the necessity for making the sale continues.

EXECUTORS AND ADMINISTRATORS (120, 133)—SALES UNDER ORDER OF COURT—NOTICE—SUFFICIENCY—VACATION OF SALE. An executor's sale of real estate at prices below the present appraised value will be set aside at the instance of interested parties, where notices of sale contained imperfect descriptions of the property and no title of the cause, and some of the notices were unsigned and did not mention the date or place of sale and were not published more than ten days; in view of Laws of 1917, p. 678, § 127, prescribing the requisites for the notice and publication for three successive weeks.

Appeal from an order of the superior court for King county, Hall, J., entered April 13, 1920, confirming an executor's sale of real estate, after a hearing on objections thereto. Reversed.

F. C. Kapp, for appellant.

W. H. Beatty and *Hastings & Stedman,* for respondents.

[1]Reported in 194 Pac. 787.

MITCHELL, J.—Mary H. Abrams died in Seattle, Washington, on August 24, 1914, leaving a nonintervention will. Surviving her were her husband, their six children, and a number of grandchildren. The will was admitted to probate on August 31, 1914. The first paragraph of the will describes a tract of land on Lake Union, King county, which she declared to be her separate property. The second paragraph of the will directs the payment of debts and funeral expenses. The third paragraph of the will is as follows:

"Third: I give and bequeath to my dear husband Robert Abrams (or if deceased, in his place and stead to my dear son Robert W. Abrams) and Joseph Allen Calwell, both of Seattle, Washington, or the survivor of them, to their or his heirs, executors and administrators, the real estate described in paragraph First hereof, to be held by them as trustees and as trustees only upon the following trusts: to cause said property to be sold within a period of time not exceeding five (5) years from the date of my decease, and to pay over the proceeds thereof or therefrom, with any accumulation or accumulations, to the following persons in the following proportions, to-wit:

"1. To my dear son Richard H. Abrams, one-seventh thereof. 2. To my dear son Robert W. Abrams one-seventh thereof. 3. To my dear son Norman B. Abrams one-seventh thereof. 4. To my dear daughter Mary Lawley of Boston, in the County of Suffolk and Commonwealth of Massachusetts, one-seventh thereof. 5. To my dear daughter Violet O'Donnell of said Seattle one-seventh thereof. 6. To my dear daughter Mildred Abrams of said Seattle one-seventh thereof.

"The foregoing six (6) payments I direct my said trustees herein nominated to make forthwith to the beneficiaries named above as soon as funds come into their or his hands from the disposition, so as aforesaid hereinabove directed to be made of the said property described in paragraph First hereof.

"7. To my grandchildren living at the time of my decease, a one-seventh interest therein, in equal proportions, share and share alike, to each his or her proportionate share in said one-seventh interest, with the accumulation or accumulations thereof and therefrom, payment to be made thereof however only when each attains and as each attains the age of twenty-one (21) years and to that end I therefore authorize and direct my said trustees, or the survivor of them, their or his heirs, executors and administrators, to invest and reinvest the legacy and bequest given to them in trust for my said grandchildren by Section 7 of Article Third of this will, in sound investments, and I give to them as such trustees or the survivor of them their or his heirs, executors and administrators, full power and authority to sell both real estate and personal estate in which said interest or any part thereof may be invested or reinvested, at public auction or private sale and to sign and deliver instruments of transfer which may be legally necessary and proper. I direct that the purchaser or purchasers at any such sales both from my said executors or executor, trustee or trustees, or their survivor, shall not be required to see to the application of the purchase-money, and I also declare that the receipts of my executors or trustees or their survivor to all persons whatsoever for all moneys, securities or effects paid or delivered to such trustees or executors, or their survivors, shall exonerate the persons taking the same from all liability to see to the application of the moneys, securities or effects therein mentioned."

Robert Abrams and Joseph Allen Calwell, the persons named in the will, promptly made and filed their oaths of office as executors. An inventory sworn to by both of them was duly filed showing only the real property on Lake Union, described in paragraph one of the will. An appraisement of the property was made and filed. Later, an order was made and entered declaring notice to creditors had been duly given, that the inheritance tax due the state had been paid and

that the estate was solvent. Considerable friction soon arose and continued between Abrams and Calwell as to the management of the estate, which was brought to the attention of the court, and finally on June 21, 1915, Calwell filed his written resignation

"as one of the executors of the estate of Mary H. Abrams, deceased, and hereby represents that the remaining executor, Robert Abrams, is in the position, and competent to complete the administration of said estate so far as the duties of an executor are required."

On the same day, an order was entered accepting the resignation and relieving him from any further care as executor in the management of the estate. It was further adjudged to be unnecessary to appoint a successor of Calwell as co-executor.

It appears that, without the intervention of the court, a portion of the real estate mentioned in the inventory was sold for an amount wholly insufficient to pay the debts and charges against the estate. Thereafter, upon petition by Robert Abrams, the superior court ordered a sale of the remainder of the property and confirmed the sales made under the order. The order of sale and the orders confirming the sales were made over the objections of Vashta McClure who had succeeded to the rights of Robert W. Abrams, one of the children, in the estate by a conveyance from him. The orders were made over the objections of Calwell, also, who appeared therein on behalf of his wife, Mildred Calwell, and as a trustee under the will notwithstanding his resignation as an executor. The property was ordered to be sold, and it was sold in four parcels, separately described and further designated in the petition and report of sales as parcels "A," "B," "C" and "D." The order approving and confirming the sales of parcels "A" and "B" in the sums of $775 and $975 respectively was entered on February

13, 1920, from which order no appeal has been taken. The order approving and confirming the sales of parcels "C" and "D," in the sums of $9,000 and $4,000 respectively, was signed in open court and entered on April 13, 1920, whereupon Vashta McClure gave notice in open court of appeal which she has perfected.

There is no bill of exceptions or statement of facts in the case. For the purposes of the sale of the real estate, all of the grandchildren of the testatrix who were minors, were represented by a guardian *ad litem.* Subsequent to the filing of the petition for the sale and prior to making the sales, by order of the court, there was a re-appraisement of the property by parcels as follows: "A" $1,500, "B" $1,000, "C" $14,825 and "D" $7,688.

The petition to sell the property, consisting of the four parcels, was filed in November, 1919, more than five years after the death of the testatrix. The petition was for a sale at public auction. In substance, it recited the terms and conditions of the devise of the properties subject to indebtedness and charges of administering the trust; that, by means of a general depressed condition of the real estate market during the five years, the real estate could not have been sold without great sacrifice; that it had not been advisable to sell any portion thereof, although efforts had been made to sell at reasonable prices, without success; that much discontent exists between the respective devisees, a number of whom desire that the property be converted into cash and distributed according to the terms of the will; and that the property should be sold at public sale.

On the day fixed for hearing the petition, appellant, by her counsel, appeared generally and objected to the consideration of the petition, alleging the court was

without jurisdiction in the matter because of the nonintervention character of the will and the order of solvency entered in the cause, and also for the further reason that the limit of five years mentioned in the will within which the property was to be sold had expired and that there was no longer any power or authority to sell the real estate or any portion of it—the trust having ceased to exist by expiration of the limitation of time mentioned in the will.

Upon the hearing an order was entered overruling the objections. It recites the taking of evidence. Findings were made which substantially conformed to the facts set out in the petition, among others, that Robert Abrams had personally made reasonable efforts, without success, to sell the property at satisfactory prices; and it was adjudged and decreed that the property be sold at public sale.

It is contended by the appellant that, as the will is a nonintervention will, therefore the superior court acting in probate had no jurisdiction whatever to entertain a petition for the sale of the real estate. A number of the earlier cases of this court are cited and relied on in support of the argument. However, we find no occasion to examine them for the purposes of this case. In the case of *Bayer v. Bayer,* 83 Wash. 430, 145 Pac. 433, after reviewing earlier cases of this court wherein generally proceedings in probate were commenced against executors acting under nonintervention wills, this court said:

"The statute itself provides, 'Such estates *may be* managed and settled' without the intervention of the court. It does not provide that they *must* be managed by the executor without the intervention of the court. There is nothing in the statute which prevents an executor from invoking the jurisdiction of the superior court, whether it be called the equity or probate jurisdiction, if he deems it expedient to do so."

And further in the same case it was said:

"The point we desire to emphasize is that there is a marked difference between a proceeding by a third party to require the executor of a nonintervention will to come into probate court, and a proceeding by the executor himself invoking the jurisdiction of such court."

Appreciating the doctrine of that case, the legislature in the probate code of 1917 (Laws of 1917, p. 642, ch. 156), after continuing the law as to nonintervention wills, with some added provisions not important here, and after providing, in harmony therewith, by p. 684, § 146, "when property is directed by will to be sold, or authority is given in the will to sell property, the executor *may* sell any property of the estate without the order of the court, and without any notice, etc.," it declared in § 219, p. 706:

"It is the intention of this act that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. If the provisions of this (act) with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled."

That is to say, the legislature has declared, and does intend, that the superior courts, in the exercise of their jurisdiction of matters of probate, shall have power and authority to settle estates. There is the possibility, for some purposes, of no need to apply to the court; but, in the event of an application by one en-

titled thereto, there can be no question of the power of the court, in the use of which power § 220 provides:

"In exercising any of the jurisdiction or powers by this act given or intended to be given, the court is authorized to make, issue and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes not inconsistent with the provisions of this act, which may be considered proper or necessary in the exercise of such jurisdiction."

Upon the other point in the objections, that the trust had ceased by the expiration of five years from date of the death of the testatrix within which to make the sale, this situation was of itself enough to invoke the aid and jurisdiction of the court, calling as it did for the construction of the will. The point, though presented in the assignments of error and in the brief, is not discussed by the appellant. It is, we think, without merit. By the terms of the will, the property was not devised to the ultimate beneficiaries, but to the two trustees in trust to be sold by them and the proceeds, subject to debts, charges and expenses, distributed, one-seventh to each of the six children and the other one-seventh to be invested and reinvested, with directions that the principal and accumulations thereon should be divided, share and share alike, to each of the testatrix's grandchildren living at the time of her death.

Where trustees are directed to sell within a time specified, the designation of time will in most cases be treated as directory merely, and the lapse of that time without their making any sale, where the necessity for the sale continues, appears not to terminate their power of sale. 26 R. C. L. (Trusts) § 141, p. 1290. Or, as was, in effect, said in *Kidwell v. Brummagim,* 32 Cal. 436: A provision contained in a will directing

the executor to sell property within one year, is merely directory, and does not limit the exercise of that power to that period, where power to sell is coupled with, and is subsidiary to, certain express trusts, and is given as the means and the only means, of carrying out those trusts. That rule is applicable in the present case, and we are satisfied the superior court had the power and jurisdiction to make the order of sale, that the objections were properly overruled, and that the order was proper under the circumstances shown by the petition and order.

Upon the executors' report of the sale, the appellant filed objections to the confirmation upon the same grounds urged against the petition for the order of sale, and for the additional reason that, as shown by the record, the court had no jurisdiction to confirm the sale. Afterwards and before the report was heard by the court, the objections were made more explicit by reciting that the notice of the sale was not given as required by the law in several important particulars. There is a dispute as to whether the later objections were called to the attention of the court, and there is no statement of facts to settle the controversy. However, the later specific objections were filed on April 12, 1920. The order confirming the sale though dated April 12 was not filed until April 13, 1920. It appears to have been signed and filed in open court, whereupon notice of appeal was given at that time. The order recites that objections were made by the appellant, and it appears those first filed were sufficient to present the objection later made more specific, because the things objected to appeared upon the face of the report. They are shown by affidavits of publication filed with the report and set out in full therein, and it is so recited in the court's order. The order of sale

contains no direction as to the place at which the sale shall be made, nor as to what notice should be given of the sale. It appears that, without any fault of, and in the absence of his attorneys, the executor himself looked after the preparation of the notices and directed the publication thereof. As shown by the report and affidavits of publication, they contained imperfect descriptions of some of the property; there were four different kinds of notices published, in each of which part of the property here involved was imperfectly described; none of them mentions the title of the cause, nor of the court ordering the sale; two of them are unsigned, one of which does not mention the date of sale nor the place at which it will take place; three of them mention the hour of the sale which was made on the property; and altogether they were published in two different newspapers, neither notice having been published more than ten days.

Section 127 of the probate code (Laws of 1917, p. 678, ch. 156) provides:

"When real property is directed to be sold at public auction, notice of the time and place of such sale shall be posted . . . and such notice shall be published in some newspaper published in said county, if there be one . . . once a week for three successive weeks before such sale, in which notices the property ordered sold shall be described with proper certainty. . . . All sales of real estate at public auction shall be made at the front door of the court house of the county in which the lands are, unless the court shall by order otherwise direct."

Whatever may be said of the insufficiency of any one of the irregularities complained of to overcome timely objections to the confirmation of the sale, we are satisfied that, altogether, they constitute such substantial departures from the requirements of the

statute that, considered in connection with the reduced sale prices compared with the present appraised values, they must be taken to be good and valid reasons to sustain the objections of an interested party to the confirmation of the sales.

Reversed and remanded with directions to set aside the order confirming the sale of the two parcels spoken of as tracts "C" and "D."

HOLCOMB, C. J., MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15951. Department Two. January 8, 1921.]

In the Matter of the Estate of BETSY ANDERSON JOHNSON.

AGNES ANDERSON YOST *et al., Appellants,* v. ELDON E. JOHNSON *et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS (59)—ALLOWANCE TO SURVIVING SPOUSE—PETITION—SUFFICIENCY. In a petition to set aside property to a widow in lieu of a homestead, an allegation that no declaration of homestead had ever been filed, is a sufficient compliance with Laws 1917, p. 670, § 103, requiring that "no homestead has been claimed in the manner provided by law."

SAME (62)—ALLOWANCE BY COURT—DETERMINATION OF VALUE—EVIDENCE—SUFFICIENCY. The value of property set aside to a widow in lieu of a homestead is sufficiently shown where there was no evidence to contradict the value as testified to by the defendant.

SAME (60)—ALLOWANCE TO SURVIVING SPOUSE—NONRESIDENTS. A nonresident widow is entitled to the allowance of $3,000, under Laws 1917, pp. 670, 671, §§ 103, 104, providing that the home, household goods and property not exceeding $3,000 shall be set aside to the widow; since the law is not strictly a homestead or exemption law, but is based on charity to prevent dependency and is to be liberally construed; the widow being in no sense a contending party as to creditors.

SAME (64)—IMPROPER OR EXCESSIVE ALLOWANCE. An allowance to a widow in lieu of a homestead will not be set aside and a new trial

[1]Reported in 194 Pac. 834.

granted because the property was of greater value than found by the court, where the parties appeared in answer to the petition, and offered no evidence to show value, and made no objection to the testimony offered.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered November 3, 1919, setting over the homestead allowance to the surviving spouse of the decedent, after a hearing before the court. Affirmed.

C. T. Roscoe (*D. W. Locke,* of counsel), for appellants.

E. L. Turner, for respondents.

MOUNT, J.—This appeal is from an order of the lower court setting aside $3,000 to Eldon E. Johnson, the surviving spouse of his wife, Betsy Anderson Johnson, deceased. Mrs. Johnson died in January, 1919, leaving an estate in Snohomish county of this state. She left no children. Her husband survived her and also several brothers and sisters. After Mrs. Johnson's death, Mr. Johnson was appointed administrator of her estate. The estate was appraised and administered upon by Mr. Johnson. All the debts were paid and a report was filed showing the balance of the estate was of the net value of $3,457. Mr. Johnson thereupon filed a petition asking that the sum of $3,000 in value be set off to him out of his wife's estate. He alleged in his petition no declaration of homestead was ever filed upon any of the described property by the deceased or the petitioner; that there were no mortgage liens or liens of any kind against the property; that all the debts had been paid, and that six months had elapsed since the date of the first publication of notice to creditors of said estate.

To this petition, the brothers and sisters of Mrs. Johnson filed a demurrer. This demurrer was overruled, and they thereupon filed an answer objecting to the court setting over the $3,000, upon the ground that Mr. Johnson was a resident of Oregon and not a resident of this state. This petition and answer came on to be heard and at the conclusion thereof the court made the order setting over to Mr. Johnson property valued at $3,000. The brothers and sisters of Mrs. Johnson have appealed from that order.

The appellants argue, first, that the petition is insufficient because the statute provides (Laws of 1917, p. 670, ch. 156, § 103):

"If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court, upon such notice as may be determined by the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand dollars ($3,000)."

It is argued by the appellants that, because the petition alleged "that no declaration of homestead was ever filed upon any of said described property by deceased or the petitioner," it is insufficient because it does not say, as provided by the statute, "that no homestead has been claimed in the manner provided by law." We think the allegation in the petition that no declaration of homestead was ever filed upon any of said property means the same thing as the statute which says "no homestead has been claimed in the manner provided by law." We are of the opinion,

therefore, that there is no merit in the contention that the petition is insufficient.

Appellants further argue that there was insufficient evidence to show the value of the property. The report of the administrator was on file, as was also the report of the appraisers. The administrator testified that a part of the property was worth more than the property was inventoried by the appraisers. He testified as to its value. There was no attempt upon the hearing of the petition to dispute the value which the respondent placed upon the property. We are satisfied, therefore, that the court very properly found that the property was of the value as testified to by the respondent, namely, $3,457, after all the debts had been paid.

Appellants further argue that the evidence showed that the respondent had filed upon a government homestead in the state of Oregon, and was therefore not entitled to claim the value of the homestead in this state out of his wife's separate property. The respondent testified on this question that he had filed upon government land in the state of Oregon; that he had lived on it for a time but had made no final proof thereon. He also testified that his residence was in the state of Oregon. In *In re Lavenberg's Estate,* 104 Wash. 515, 177 Pac. 328, we had occasion to pass upon this direct question where a nonresident widow was claiming $3,000 out of her husband's estate in this state. We there held that she was entitled to claim that amount under the statute and we there said upon this question:

"A judicial duty imposed by the legislature compels the setting apart of the property, and against the order of the court nothing will avail unless it be the voluntary renunciation of the widow. It is the policy of our probate law, now evidenced by §§ 103, 104, Laws

of 1917, pp. 670, 671, that compels rejection of the general rule that homesteads and lieu exemptions cannot be claimed by nonresidents. For, as against an imperative duty, no qualification of residence being imposed, the courts will look only to the relationship and not to the place of residence."

We think the ruling in that case is decisive of the question before us. The statute which we have above quoted recites that

"The court . . . shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand ($3,000)."

No exception is made as to residence or nonresidence, and we are of the opinion that it makes no difference whether a nonresident has a home or homestead in some other state, he is entitled to what the laws of this state give to the spouse.

The appellants further argue that the trial court erred in not granting a new trial because of certain affidavits which were filed stating that the value of the property was in excess of that found by the trial court. We are of the opinion that the question of the value of the property was one to be determined upon the petition. These appellants appeared in answer to the petition. They made no objection to the testimony which was offered as to the value of the estate. They then had an opportunity of proving the value of the estate, if in their opinion it was worth more than the evidence of the petitioner tended to show. They offered no evidence upon that question. They had their day in court, and the mere fact that they failed or neglected to introduce evidence upon that question is not sufficient ground for a new trial.

Appellants cite the case of *In re Fick's Estate,* 111 Wash. 318, 190 Pac. 1008, as authority for the con-

tention that the order setting aside property to the surviving spouse may be set aside when the value of the estate is greater than that shown in the petition. The *Fick Estate* case was one where the order was obtained by fraud; and not only that, the minor heirs who were interested in the estate were not represented and did not appear in the action, and it was for that reason, principally, that the order making the allowance was set aside. There are no such facts in this case.

We find no error in the record and the judgment is therefore affirmed.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 16013. Department Two. January 8, 1921.]

W. L. GAZZAM *et al.*, *Respondents*, v. J. R. YOUNG *et al.*, *Appellants*.[1]

LANDLORD AND TENANT (27)—DISTINCTION BETWEEN ASSIGNMENT AND SUBLEASE. An instrument in the form of lease executed by a lessee and subletting the premises for the full term in the exact terms of the original lease, operates as an assignment.

SAME (126, 139)—UNLAWFUL DETAINER—EXISTENCE OF CONVENTIONAL RELATION—PARTIES BY AND AGAINST WHOM ACTION LIES. An assignment of the lease without the knowledge or consent of the landlord, leaves the original lessee as his tenant; and the landlord may maintain unlawful detainer against the tenant and the subtenants.

SAME (15)—LEASE—CONDITIONS — STIPULATION AGAINST "TRANSFER." A lease providing that the same shall not be "transferred" without the written consent of the lessor cannot be "assigned" without such consent.

APPEAL (222)—REQUISITES FOR TRANSFER—NOTICE—FILING—PROOF OF SERVICE. An appeal will not be dismissed because of failure to file proof of service of notice of appeal within five days, where the

[1]Reported in 194 Pac. 810.

proof was filed later and brought up by supplemental record and no delay or injury resulted.

LANDLORD AND TENANT (147)—UNLAWFUL DETAINER—DOUBLE DAMAGES. In unlawful detainer against a lessee and against subtenants to whom the lease had been assigned without the written consent of the lessor, damages in twice the amount of damages assessed and overdue rent must be awarded against the original lessee as well as against the subtenants.

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered April 19, 1920, upon findings in favor of the plaintiff, in an action for unlawful detainer. Affirmed on defendants' appeal; reversed on plaintiffs' appeal.

Kelleran & Hannan, for appellant Young.

Silvain & Butler, for appellants Kuwabara.

Edwin James Brown and *Chadwick, McMicken, Ramsey & Rupp,* for respondents.

MOUNT, J.—This is an action of unlawful detainer. It was brought under the provisions of § 812, subd. 4, Rem. Code, which reads as follows:

"A tenant of real property for a term less than life is guilty of unlawful detainer either, . . .

"(4) When he continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring . . . in the alternative the performance of such condition or covenant or the surrender of the property, served (in the manner provided in this act) upon him, and if there be a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other per-

son interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture."

The trial of the case to the court without a jury resulted in a judgment to the effect that plaintiffs were entitled to the immediate possession of the premises against all the defendants, and to a judgment in the sum of $8,213 against the defendants Kuwabara but for costs only against the defendant Young. All the parties have appealed. They will therefore be referred to in this opinion as parties plaintiff and defendant.

The undisputed facts are as follows: In August of 1918, the plaintiffs were the owners of an apartment house in the city of Seattle known as the Lafayette apartments. On August 8 of that year, the plaintiffs leased to the defendant Young these apartments for the period of five years, at a rental of $33,000, payable $550 per month. This lease was signed and acknowledged on August 20, 1918. This lease from plaintiff Gazzam to defendant Young, among other things, contained the following provision:

"This lease is not to be transferred without the written consent of the lessor."

On August 19, the day before the lease from Gazzam to Young was executed, Mr. Young entered into a lease with Mrs. A. D. Craig for the same premises and for the same term for the sum of $42,000, payable $700 per month. Mr. Gazzam did not give written consent to this lease from Young to Craig. The lease from Young to Craig was a formal lease substantially the same as the lease from Gazzam to Young, and so far as appeared upon the face of the lease, Mr. Young was the owner of the apartment house. On October 10, 1918, Mrs. Craig, with the consent of Mr. Young, as-

signed her lease to H. Hoffman and others. Thereafter Mr. Hoffman, on February 3, 1919, with the consent of Mr. Young, assigned the lease to the defendants Kuwabara. Thereafter on August 29, 1919, the statutory demand was made in writing by the plaintiffs, as provided by the statute above quoted, and notice of forfeiture given for breach of the covenant because the lease from plaintiffs was transferred without the written consent of the lessor. None of the defendants complied within the statutory period, and thereupon this action was brought.

At the trial of the case, it was sought by the defendants to show that plaintiffs knew of the lease from Young to Craig, and thereby waived the provision in the lease that it was not to be transferred without the written consent of the lessor, and that the plaintiffs are now estopped to contend otherwise. This was a disputed question of fact upon the trial. The defendants Young and Kuwabara argue here that the great weight of the evidence is to the effect that Gazzam knew of the lease from Young to Craig before the lease was executed by Gazzam to Young, and that Gazzam made no objection thereto but consented to that lease. On the other hand, Mr. Gazzam stoutly denied that he knew of the lease from Young to Craig or the assignment from Craig to Hoffman, or the assignment from Hoffman and others to Kuwabara, until just before this action was begun; that immediately upon learning the fact that Young had assigned his lease, Gazzam gave the statutory notice and brought this action.

As we have said, this was the main disputed question of fact. The trial court, after seeing and hearing the witnesses, concluded that Mr. Gazzam had no notice or knowledge of the transfer of the lease by

Mr. Young to the other parties. On reading the record in the case, we are disposed to agree with the trial court upon that question.

The defendant Young contends that this action can be maintained only where the conventional relation of landlord and tenant exists. He argues further that, if the lease from Mr. Young to Mrs. Craig is an assignment of his interest in the premises, he has assigned his whole interest and is not in possession and for that reason cannot be made a party to the action. He also argues that, if the Kuwabaras are in possession under an assignment from Young, these tenants are not the tenants of Mr. Young and for that reason Mr. Young cannot be made a party; and that, if the Kuwabaras were subtenants, then there has been no violation of the terms of the lease against an assignment. We think there can be no question but that the lease executed by Mr. Young to Mrs. Craig was an assignment of the interest of Mr. Young in the premises. The lease executed by Mr. Young to Mrs. Craig was for the full term of the lease. It provided substantially the same as the original lease from the plaintiffs to Mr. Young. In the case of *Sheridan v. Doherty*, 106 Wash. 561, 181 Pac. 16, we said:

"It is established that, if a lessee sublet the premises or a portion of the premises for the entire term or the remainder of a term, the subletting will operate as an assignment either of the entire estate or *pro tanto* as the case may be."

And in *Weander v. Claussen Brewing Ass'n*, 42 Wash. 226, 84 Pac. 735, 114 Am. St. 110, 7 Ann. Cas. 536, we said:

"The instrument is in the form of a lease, and contains apt words designating it as such; but it covers the entire term which respondent has acquired by its own lease. No portion of the term whatever is re-

served for reversion to respondent. It is conceded that the terms and covenants of the instrument are in the exact words of the lease held by respondent, and no other or new covenants are included therein. We think, under the authorities, that the legal effect of such an instrument is that of an assignment in full of the lease by its holder."

It follows from these decisions that, when Mr. Young executed the lease from himself to Mrs. Craig for the full term of the lease which he had obtained from Mr. Gazzam, and in substantially the language of that lease, that amounted to an assignment of his lease from Mr. Gazzam. Mr. Gazzam, according to the evidence, did not waive his right to require written consent of a transfer and the trial court found that he did not know of the transfer. It follows that, since Mr. Gazzam did not authorize the lease, either orally or by writing, he may hold Mr. Young as his actual tenant. The words in the statute which we have quoted above, "when he continues in possession in person or by subtenant," the word "subtenant" here means any person holding under authority of a tenant. The defendants Kuwabara hold by assignment from Mr. Young. They are in substance his tenants while Mr. Young is the tenant of Mr. Gazzam, the original lessor. Therefore when Mr. Young without the consent of Mr. Gazzam leased the premises to others for the full term the others became his subtenants. Mr. Gazzam has a right to look to Mr. Young at all times for the rent and for compliance with the terms of the written lease between Mr. Gazzam and Mr. Young. Upon this question, we said in *Sheridan v. Doherty, supra:*

"The transaction may be called a lease between the second and third parties and nevertheless operate as an assignment as between the original lessor and such third party. 16 R. C. L., pp. 824, 825. When the ques-

tion is raised between the owner and the sublessee, the courts have not hesitated to look to the legal effect of the contract."

See, also, 1 Underhill, Landlord and Tenant, 626.

The legal effect of the lease from Mr. Young to Mrs. Craig and her assignees was an assignment. As between Mr. Gazzam and Mr. Young, that assignment amounted to nothing because Mr. Gazzam did not consent to it and did not know of it. We think there can be no question, therefore, about the right of the plaintiff to make both Mr. Young and his tenants in possession parties to the action.

It is also argued by the defendants that, because the lease from Mr. Gazzam to Mr. Young uses the words "this lease is not to be transferred without the written consent of the lessor," the defendant Young was not prevented thereby from assigning the lease; but we are satisfied it was the intention that there should be no assignment or transfer of the leased property without the written consent of the lessor. The word "transfer," as defined by Webster's International Dictionary, means,

"The conveyance of right, title or property . . . from one person to another, whether by sale, by gift, or otherwise; any act by which the property of one person is vested in another."

This word is held in *Hendrick v. Daniel,* 119 Ga. 358, 46 S. E. 438, to have a broader meaning than assignment, and covers any act by which the owner of anything delivers or conveys it to another with intent to pass his rights therein. We are satisfied it was the intention of the parties that there should be no transfer of the property or assignment of the lease without the written consent of the original lessor.

It follows that the complaint stated a cause of action, and the trial court properly found that there had

been an assignment of the lease without the written consent of the original lessor, and therefore the plaintiffs were entitled to recover under the unlawful detainer statute.

Referring now to the appeal of the plaintiff. The court entered a judgment for double the amount of rent due against the defendants Kuwabara only, and refused to enter a judgment against Young. The plaintiffs have cross-appealed from that part of the judgment. The defendants have moved to dismiss the cross-appeal because the proof of service of the notice was not filed within ninety days. It is argued that the filing of the proof of this service is jurisdictional. In the case of *Seargeant v. Russell,* 110 Wash. 216, 188 Pac. 466, in ruling upon this identical question, we said:

"The notice of appeal was served within the time specified, but the proof of service was not made until a short time before the cause was to be heard in this court. The proof of service was filed with the clerk of the superior court and brought here by supplemental transcript. Under the holding in *Reynolds v. Reynolds,* 42 Wash. 107, 84 Pac. 579, the appeal should not be dismissed upon this ground."

The motion in this case comes within that rule.

From what we have already said, the defendant Young was guilty of unlawful detainer of the premises because he was in possession by the tenant holding under him. Section 827, Rem. & Bal. Code, provides:

"If upon the trial . . . the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of

the lease, agreement, or tenancy. The jury or the court . . . shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer . . . and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due."

It appears that no rent was paid to Mr. Gazzam from September 1, 1919, to April 20, 1920. Double damages were claimed and should have been assessed against Mr. Young as well as against the defendants Kuwabara. *Newman v. Worthen,* 57 Wash. 467, 107 Pac. 188; *Hinckley v. Casey,* 45 Wash. 430, 88 Pac. 753.

As to the defendant Young, the judgment of the court is reversed with directions to enter a judgment against him for the same amount as was rendered against the defendants Kuwabara. The plaintiffs will recover their costs on this appeal.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 16134. Department Two. January 8, 1921.]

AKIYO KUWABARA *et al.*, *Appellants*, v. W. L. GAZZAM *et al.*, *Respondents*, FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Intervener, Appellant.*[1]

DEPOSITS IN COURT (3) — RIGHTS AND LIABILITIES OF PARTIES. Money deposited in court as rent due for premises pending an appeal in an action for unlawful detainer, in which the judgment of the court found that the rent was due the plaintiff, is properly ordered paid to the plaintiff, when the judgment was not superseded on the appeal.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 21, 1920, upon the pleadings in favor of the defendants, in an action of interpleader. Affirmed.

Silvain & Butler, for appellants Kuwabara.

Kelleran & Hannan, for appellant Fidelity & Deposit Company of Maryland.

Edwin James Brown and *Chadwick, McMicken, Ramsey & Rupp*, for respondents.

MOUNT, J.—This action grows out of the action of Gazzam against Young and others just decided. When that action was brought, a writ of restitution was issued. Under the statute, the writ was not to be executed within three days (Rem. Code, § 820). Within the three days, the defendants in that action, Kuwabara and Young, gave a counter bond with the Fidelity & Deposit Company of Maryland as surety, conditioned

"that they would pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of such premises and any rent, found due, together

[1]Reported in 194 Pac. 812.

with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of said premises, and also all the costs of the action,"

not exceeding $3,300. Thereafter Mr. Kuwabara paid into the registry of the court, on the first of each month during the pendency of that action, the sum of $550 for a period of six months. Thereupon Mr. Kuwabara brought this action alleging, among other things, that the money thus paid into the court was claimed by both Gazzam and Young, and prayed the court to adjudicate the rights of Young and Gazzam to the money. Young thereupon filed an answer and cross-complaint claiming the money as his own.

After the case of *Gazzam v. Young, ante* p. 66, 194 Pac. 810, was decided by the trial court, the plaintiffs in that action filed an answer in this action alleging, among other things, that a judgment had been rendered in his favor against Kuwabara for $8,213 and costs, and claiming the right to the whole of the money so deposited. The Fidelity & Deposit Company, surety upon the bond, also filed an answer alleging that the case had been appealed to this court and asked for a stay pending the appeal. No supersedeas bond was given upon that appeal.

Upon these pleadings, the trial court granted a judgment in favor of Gazzam authorizing him to withdraw the money from the registry of the court in satisfaction *pro tanto* of his judgment against Kuwabara. This appeal is prosecuted from that judgment.

Under the decision which we have rendered in the case of *Gazzam v. Young, supra,* it is apparent that this money deposited in the court may be applied in satisfaction of that judgment *pro tanto,* because the money is neither the money of Kuwabara or the insurance company or Young. It was deposited as rent for

the premises in the exact amount due upon the lease from Young to Gazzam, and belonged of right to Mr. Gazzam. As stated above, the judgment in that case was not superseded. The court was clearly right in ordering the money to be paid to Mr. Gazzam to apply upon his judgment.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., MITCHELL, TOLMAN, and MAIN, JJ., concur.

[No. 16062. Department One. January 8, 1921.]

WILLIAM MURPHY, *Respondent*, v. FIDELITY ABSTRACT AND TITLE COMPANY, *Appellant*.[1]

ABSTRACTS OF TITLE (2)—REQUISITES—PRIVITY. There is sufficient privity of contract to render an abstract company liable to plaintiff for an untrue statement in an abstract furnished at the request of plaintiff's attorneys, although the agency was not disclosed, or the purpose of the abstract stated.

SAME (2)—RIGHTS, DUTIES AND LIABILITIES OF EXAMINERS OF TITLES. An abstracter is not warranted in reporting that an assessment lien was paid in full, where the county treasurer did not receive the amount of the assessment in payment of the tax, but only as the purchase price of the county's lien upon transfer of a certificate of delinquency.

SAME. The fact that a certificate of delinquency was not filed in the auditor's office does not warrant an abstracter in stating in the abstract that the assessment was paid in full.

DAMAGES (26)—MITIGATION AND REDUCTION OF LOSS—DUTY TO COMPROMISE. In an action to quiet title to land held by plaintiff under a tax title, plaintiff's offer to release his interest upon defendant's payment of $450, does not require the defendant to pay that sum and thereby mitigate his damages from the loss of the land, which was worth more than twice that amount, in order to recover his loss from an abstracter liable to defendant therefor on account of an untrue statement in the abstract.

[1]Reported in 194 Pac. 591.

SAME. In an action against an abstracter for damages on account of an untrue statement in the abstract, defendant cannot plead, in mitigation of damages, that plaintiff could have compromised the claim by paying $450, and failed to give defendant an opportunity to pay the same, where it appears that defendant would have unhesitatingly refused to make such payment.

SAME (30) — GROUNDS OF COMPENSATORY DAMAGES — ATTORNEY'S FEES. In an action against an abstracter for making an untrue statement, resulting in the loss of the land, plaintiff may recover reasonable attorney's fees and expenses in defending a suit brought against him to quiet title, where he was fully warranted in defending the suit.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered November 4, 1919, upon findings in favor of plaintiff, in an action on contract, tried to the court. Affirmed.

Stephen E. Chaffee and *O. L. Boose*, for appellant.
Lee & Kimball and *Delle & Delle*, for respondent.

PARKER, J.—This is an action for damages claimed by the plaintiff, Murphy, as a result of an untrue statement negligently made by the defendant abstract company in an abstract of title prepared by it for him, that an irrigation assessment lien upon a tract of land in Yakima county was paid, upon which land he had a mortgage. A trial upon the merits in the superior court for that county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

The facts of the case are not in dispute, except as to the question of the amount of the damages suffered by respondent, Murphy, and may be summarized as follows: In May, 1914, the then owner of the land in question executed and delivered to respondent a mortgage upon the land to secure an indebtedness owing by him to respondent. The debt so secured having ma-

tured and remained unpaid so as to entitle the respondent to foreclose the mortgage, he placed it, together with the abstract of title furnished him by the mortgagor at the time of the execution of the mortgage, in the hands of his attorneys, Merritt, Oswald and Merritt of Spokane, instructing them to commence and prosecute foreclosure proceedings looking to a sale of the land to satisfy the mortgage indebtedness.

With a view of ascertaining the names of all persons acquiring an interest in the land after the execution of the mortgage, to the end that such persons might be made defendants in the foreclosure proceedings; and also with a view of ascertaining the amount of all tax and assessment liens attaching to the land after the execution of the mortgage, to the end that such liens might be paid by respondent and the amount thereof included in the amount he would be entitled to claim as a part of the secured indebtedness; his attorneys, on May 11, 1915, sent the abstract by mail to appellant, accompanied by their letter reading as follows:

Fidelity Abstract & Title Co., Inc.,
Sunnyside, Washington.

Gentlemen: Enclosed please find abstract covering a portion of the Northeast quarter (NE¼) of Section Eleven (11), Township Ten (10) North, Range Twenty-two (22), E. W. M., your county.

Please continue this abstract to date and return it to us, together with statement of your charges, for which we will immediately forward our check. Yours very truly,

MERRITT, OSWALD & MERRITT.

On May 13, 1915, appellant having, as it claims, correctly continued the abstract to that date, returned it by mail to the attorneys, accompanied by their bill charging the attorneys $15.50 for the continuation of the abstract, which charge the attorneys paid. Among other statements in the abstract, over the signature and corporate seal of appellant, touching the condition of the title to the land, there was the following:

"The above described property is within the Outlook Irrigation District, the 1914 assessment is paid in full."

At that time about one-half of the land covered by the mortgage was in fact, subject to a lien for the Outlook Irrigation District Assessment of 1914, which lien was then in the form of a certificate of delinquency, which had been issued by the county treasurer to one Page, who had become the purchaser thereof in the manner provided by law. In this manner only had the county treasurer, for the irrigation district, received the amount of the assessment; which did not discharge the lien of the assessment upon the land, but only resulted in such lien being transferred to and held by Page instead of by the irrigation district; all of which appeared upon the records in the office of the county treasurer, though the certificate of delinquency issued to Page seems not to have been filed in the office of the county auditor as contemplated by §§ 6442 and 6443, Rem. Code.

Appellant was not advised of the fact that the attorneys were procuring the continuation of the abstract for anyone other than themselves, and did not know until some time thereafter that the attorneys were acting in respondent's behalf in procuring and paying for the continuation of the abstract. Soon after the return of the abstract to them, the attorneys commenced foreclosure proceedings upon the mortgage, in the superior court for Yakima county, and relying upon the statement made in the abstract that the 1914 irrigation assessment was paid, gave no further thought to the lien of that assessment or to the possibility of there being an outstanding delinquent certificate therefor. Respondent became the purchaser of the whole of the land in satisfaction of his mortgage at the execution

sale thereof, made in pursuance of the foreclosure decree.

In the meantime, there having been no redemption of the irrigation assessment delinquency certificate issued to Page, a county treasurer's deed was duly issued conveying to him the portion of the mortgaged land which was subject to the lien of that assessment, such portion being about one-half of the mortgaged land. Respondent and his attorneys, at all times relying upon the statement made in the abstract that the 1914 assessment was paid, remained wholly without knowledge of the fact that the delinquency certificate therefore was issued by the county treasurer to Page, until long after the continuing of the abstract by appellant and the issuance of the treasurer's deed upon the delinquency certificate; and by reason of the want of such knowledge, respondent lost the opportunity to redeem the certificate of delinquency.

In August, 1916, Page commenced an action in the superior court for Yakima county seeking a decree quieting his title as against respondent, to the portion of the land covered by his delinquency certificate and deed issued to him by the county treasurer. Respondent appeared and defended in that action, but was unsuccessful, a trial upon the merits resulting in a decree quieting title in Page to the portion of the land covered by the treasurer's certificate of delinquency and deed; the court holding, in effect, that the treasurer's deed issued upon the unredeemed certificate of delinquency, created in Page title to the portion of the land covered thereby superior to the claim of lien and title made by respondent by virtue of his mortgage and the foreclosure thereof. Respondent did not notify appellant of the pendency of that action to quiet title, but it is not claimed that respondent did not, in good faith, do all

that was legally possible to be done looking to the defeating of the claim of title made by Page under his certificate of delinquency and treasurer's deed.

At the close of the evidence during the trial of that action to quiet title, and before the final submission of the cause for final decision, Page offered to release to respondent all of his interest in the land upon the payment to him of $450, which offer respondent declined to accept. The fact of the making of this offer by Page to respondent was not communicated to appellant so as to give it an opportunity to pay the $450 to Page and save respondent from the loss of the portion of the land covered by the delinquency certificate and treasurer's deed. We think, however, that the record clearly warrants the conclusion that appellant would have then declined to pay the $450 to Page looking to the saving of the land to respondent; indeed appellant does not now claim that it would have done so, had it been given the opportunity.

It is first contended in behalf of appellant that it is in no event liable to respondent for the loss of the portion of the mortgaged land covered by the certificate of delinquency and the deed issued to Page by the county treasurer, because there was no privity of contract between it and the respondent placing upon it any contractual duty to respondent in the continuation of the abstract. The argument is that appellant's contractual duty was only to the attorneys, since it had no notice of the fact that the attorneys were acting for anyone other than themselves in their requesting appellant to continue the abstract, and in their paying appellant therefor. Counsel invoke the general rule stated by Judge Crow speaking for the court in *Bremerton Development Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69, as follows:

"An abstracter's liability for damages arising from negligence or want of care in making an examination of records and in preparing an abstract of title is contractual. The weight of authority is that such liability extends only to the person by whom the abstracter was employed. There must be a contract or privity of contract to create liability, as it does not originate in tort. 1 Cyc. 215; *Thomas v. Guarantee Title & Trust Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210."

This, it may be conceded, is a correct statement of the law on that subject; though in that case it was decided as a disputed question of fact that the mistake in question occurred in the continuation of the abstract made for the plaintiff, rather than in the previously prepared portion of the abstract made for other persons as was contended; and the plaintiff was awarded recovery of damages resulting to him from the defendant's mistake in making the continuation of the abstract.

This general rule was also recognized in *Anderson v. Spriestersbach,* 69 Wash. 393, 125 Pac. 166, 42 L. R. A. (N. S.) 176. In that case, there was involved the preparation and delivery of an abstract by the defendant to a prospective purchaser of the land in question, at the request of the owner. Holding the defendant liable for damages resulting to the purchaser to whom the abstract was delivered, and recognizing the general rule to be as stated in the *Bremerton Development Co.* case, *supra,* Judge Chadwick, speaking for the court, said:

"This rule is sustained by the weight, considered in numbers, of authority; but we are not willing to apply it, unless it is plain that there was no duty on the part of the abstracter to the party injured. In this case the abstracter not only knew the purpose of the abstract, but became the agent of the other party to the

transaction, out of which the loss resulted, to deliver it to defendant. He knew that the trade, if made at all, would be made upon the faith of his certificate."

In *Equitable Bldg. & Loan Ass'n v. Bank of Commerce & T. Co.*, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, and in the note appended to the decision found in the last citation, will be found reference to decisions of the courts which are in harmony with the views expressed in our *Anderson* case. In *Young v. Lohr*, 118 Iowa 624, 92 N. W. 684, we have a case of undisclosed principal which seems to us so directly in point as to be decisive of our present inquiry, in favor of respondent. In that case, there was involved the procuring of an abstract by loan agents of the owner of the land, looking to the procuring of a loan and the satisfaction of an existing mortgage and other liens upon the land. Holding that the abstracter was liable to the owner of the land, who was the undisclosed principal of the agent, Judge Sherwin, speaking for the court, said:

"There was evidence showing that Walters & Wadsworth were acting as the agents of plaintiff in procuring an extension of the abstract. It is true that their agency may not have been disclosed by their action or by the nature of the transaction, but such disclosure was not necessary to create liability on the part of the defendant. If the agency in fact existed, the abstract was furnished for the plaintiff, and he was liable to the defendant for the service rendered, whether the defendant knew him as a principal or not. Being liable for this service, he is entitled to reciprocal rights against the defendant, and may maintain this action, subject to any defense which the defendants might have interposed against the agents. Mechem on Agency, section 769, and cases cited thereunder; 1 Am. & Eng. Enc. Law (2d ed.) 1168."

We conclude that there was such privity of contract between appellant and respondent in this case as to

render appellant liable to respondent for such damages as he may have suffered by reason of the untrue statement made in the continuation of the abstract as to the payment of the 1914 irrigation assessment lien.

It is next contended that the statement in the abstract that "the above described property is within the Outlook Irrigation District, the 1914 assessment is paid in full" was true. We do not think so, in so far as the payment of the assessment is concerned. This contention, it seems to us, has no other foundation to rest upon than the fact that the county treasurer received for the irrigation district the amount of the 1914 assessment. He did not, however, receive that amount in payment or satisfaction of the assessment lien, but only as the purchase price of the lien which was thereupon by him transferred to Page by the issuing to Page of a delinquent assessment certificate therefor, all of which appeared of record in the office of the county treasurer at the time of the appellant's continuation of the abstract. This, we think, did not warrant making the unqualified statement that the assessment was "paid in full"; which statement, we think, could convey to one examining the abstract no other thought than that the assessment lien against the land had been fully satisfied and ceased to exist. Such statement in the abstract, we think, fully warranted respondent and his attorneys in so believing and acting accordingly, as they manifestly did.

Some contention is made in this connection, in appellant's behalf, rested upon the fact that the delinquency certificate issued to Page was not filed in the office of the auditor of Yakima county, as contemplated by §§ 6442 and 6443, Rem. Code. The argument seems to be that, had the certificate of delinquency been filed in the auditor's office, it would have appeared upon

the abstract as an instrument of record in that office affecting the title to the portion of the mortgaged land it covered, and respondent thereby advised of that fact, and thus rendered the statement made in the abstract that the assessment was paid, as meaning paid by the sale of the certificate of delinquency. But the fact that the certificate was not recorded in the auditor's office manifestly did not destroy nor satisfy the lien of the irrigation assessment. The failure of such a record in the auditor's office seems to us to argue that there was even greater necessity of there being a true statement of the condition and ownership of that assessment lien, as shown upon the records of the county treasurer, rather than an unqualified statement that such assessment was "paid in full." We conclude that the statement made in the abstract that the assessment was "paid in full" was not true; and that respondent and his attorneys were induced thereby to proceed upon the assumption that the assessment lien had been fully satisfied.

It is next contended that the trial court erred, in that it awarded damages to respondent in an excessive amount. This contention involves largely questions of fact as to the value of the respective portions of the mortgaged land. We are quite convinced that the evidence does not preponderate against the trial court's findings as to the values of the respective portions of the land by which it measured respondent's recovery.

It is further contended in this connection that respondent did not do his full duty looking to the mitigation of the damages which he suffered. This seems to be rested upon the fact that, at the close of the evidence, and before the final submission of the case to the court, in the action by Page to quiet title in the land as against respondent, Page offered to release all his

interest in the land to respondent upon the payment of $450. The argument seems to be that, had respondent paid to Page this $450 in pursuance of that offer, that would have been the extent of his damages; whereas the final result of that action was that he suffered damages in more than twice that amount. If Page had offered to release the whole of his interest in the land for a trifling sum, it might be that respondent's duty to mitigate his damages would have been such as to call for him paying such trifling sum and thus limit his damages accordingly; but we think that, plainly, respondent was not obliged to pay the large sum of $450 to effect a compromise of that action and in that manner mitigate his damages. 8 R. C. L. 443-445.

It is further contended in this connection, that respondent should have notified appellant of the offer of compromise made by Page, to the end that it could have made payment of $450 to Page and thus save respondent from all damages. The trouble with this contention is that the record renders it all but conclusive that, had such offer on the part of Page been communicated by respondent to appellant, it would have unhesitatingly refused to make such payment. Indeed, there is now no claim made in behalf of appellant that it would have made such payment to Page for the release of all his interest in the land to respondent. It is not contended in behalf of appellant that it was entitled, as a matter of right, to notice of the commencement and pendency of the action by Page to quiet title as against respondent, nor is it contended in appellant's behalf that respondent did not, in his defense of that action, do all that was legally possible looking to the defeating of Page's claim of title to the portion of the land covered by the certificate of delinquency and

deed issued by the county treasurer. We conclude, therefore, that appellant has not been in the least prejudiced by its want of notice of the pendency of that action to quiet title, or by its want of notice of Page's offer to release all his interest in the land upon the payment of $450.

Contention is finally made in appellant's behalf that the trial court erred in awarding to respondent, together with his other damages, an item of $125 attorney's fees expended by him in the defense of Page's action to quiet title. That respondent was fully warranted in making defense in that action, and in so doing incurring attorney's fees in that amount, we think is quite plain in view of the fairly disputable questions involved in that case. It follows that he was entitled to recover in this case as part of his damages, attorney's fees in a reasonable amount so expended by him in his defense of that action. *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180; 17 C. J. 809.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16090. Department Two. January 8, 1921.]

M. B. KIES, *as Receiver etc., Appellant,* v. JOHN WILKINSON, *Respondent,* H. C. PHILLIPS *et al., Defendants.*[1]

HUSBAND AND WIFE (84)—COMMUNITY PROPERTY—DEBTS INCURRED BY HUSBAND—TORTS—OFFICIAL DELINQUENCIES. The tort of a county clerk in obtaining an unlawful preference by withdrawing from an insolvent bank a deposit of public funds, is not a community debt, and the community cannot be held therefor.

INTEREST (7)—DEMANDS NOT LIQUIDATED. A demand against a county clerk for wrongfully withdrawing a deposit from an insolvent bank, draws interest from the date of withdrawal, where the sum wrongfully obtained was a specific amount which may be lessened by facts then existing and capable of ascertainment.

Cross-appeals from a judgment of the superior court for Clarke county, Hewen, J., entered May 28, 1920, upon findings in favor of plaintiffs, in an action in tort, tried to the court. Affirmed.

McMaster, Hall & Schaefer, for appellant.

Bates & Burnett, for respondent.

TOLMAN, J.—This case was before the court on a prior appeal, and is reported in 101 Wash. 340, 172 Pac. 351, to which reference is made for a statement of the facts and issues.

The judgment of the trial court, then in favor of the defendant Wilkinson, was reversed, with directions to permit the amendment of the complaint so as to allege the amount of the assets of the defunct bank and the amount of the claims proved and provable against it, so that it might appear that the creditors of the bank had been damaged by what was held to be the wrongful withdrawal of funds from the bank by

[1]Reported in 194 Pac. 582.

Wilkinson, and the amount of such damage, which would be the measure of recovery.

Upon the going down of the remittitur, the pleadings were so amended, and upon a second trial there was evidence received establishing the amount of the claims against the bank and the value of its remaining assets, and also that twenty per cent had been paid in dividends to creditors. The court made findings accordingly, and further found that Wilkinson's deposit in the bank was carried in the name of "John Wilkinson, county clerk of Clarke County, Washington"; that the money could be withdrawn only on checks so signed; that the amount on deposit was made up wholly of funds which came into Wilkinson's possession officially as such county clerk, and that when Wilkinson withdrew the money from the bank on January 7, 1911, he forthwith paid it over to his successor in office as county clerk. The court further found that Wilkinson was at all times a married man. From these findings the court made conclusions of law to the effect that the bank's estate was lessened and damaged on January 7, 1911, by the wrongful payment of $3,502.48 to Wilkinson, but that there should be credited thereon twenty per cent to equalize the dividends theretofore paid, thus reducing the recovery to $2,802, plus interest at six per cent on such sum from January 7, 1911 to the date of the judgment; that Wilkinson's tort in receiving and retaining the money was not committed by or on behalf of the community of which he was a member, and that the community did not benefit therefrom. Judgment was entered accordingly against Wilkinson individually, with the specific provision therein that such judgment should not affect the community composed of Wilkinson and his wife. The plaintiff has appealed from that part of the judgment which purported to make liable Wilkinson as an indi-

vidual only, and specifically exempted the community from all liability; and the defendant Wilkinson has appealed from that part of the judgment which granted recovery against him, and here contends that it was error to allow interest from January 7, 1911, or at all prior to judgment.

The plaintiff's appeal presents the sole question of whether the judgment should be a separate or community one. The trial court acted upon the theory that the tort was committed by the defendant as a public officer and therefore, under the rule established in *Brotton v. Langert,* 1 Wash. 73, 23 Pac. 803, and followed in *Day v. Henry,* 81 Wash. 61, 142 Pac. 439, and *Bice v. Brown,* 98 Wash. 416, 167 Pac. 1097, the community could not be held liable.

The liability held to be a separate and not a community indebtedness in *Brotton v. Langert, supra,* arose while the husband was holding the office of constable, and as such sold under execution personal property in which a stranger to the writ had a special property. So, also, in *Day v. Henry, supra,* the liability discussed was that incurred by a sheriff through the making of a wrongful levy. The court there said:

"If the community as such does a wrong, it must respond, just as under the same circumstances a corporation, a partnership, or any other legal entity composed of more than one person, must respond. If, on the other hand, an individual member of any of these legal entities commits a wrong, there is no liability attached to the entity simply because of his relation to it."

And the court then proceeds to demonstrate that the sheriff as such was neither a community nor a member of a community, and applies the doctrine of the *Brotton* case. In *Bice v. Brown, supra,* the liability grew out of a trespass upon real property committed by the su-

pervisors of a drainage district in their official capacity, and the same rule was applied with but little discussion.

The doctrine of *Brotton v. Langert, supra,* has been the law of this state for more than thirty years, and so far as we know has worked no flagrant injustice, nor has the legislature seen fit to change it. We are therefore not inclined at this time to overrule it.

It is argued, however, with some show of reason, that the rule does not apply here. The statute giving the husband the management of the community real estate, Rem. Code, § 5918, which has stood unamended since the beginning, has the following proviso:

"Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

It clearly appears, and has been often held by this court, that it was the intention of the legislature that any community debt, even though contracted by the act of the husband alone, may be satisfied out of the community real estate. The wrongful levies made, and the trespass committed by public officers in the course of their official duties in the cases above referred to, had no contractual elements whatever, but were torts pure and simple from which the community, of which the wrongdoer was a member, could, under no circumstances, reap any benefit; while here we have a tort, it is true, but a tort sounding in contract, and a case where the party injured might waive the tort and sue on a contract to repay, which the law implies, even though no promise to pay was in fact given; and if the law implies a contract to repay, an indebtedness arises

which will be a community indebtedness if the community profited from the transaction.

But it appears that the money obtained by the defendant belonged to the county and was by him immediately paid over to his successor in office, and therefore the community did not profit by the transaction. It is urged that, if the defendant had not obtained this money, he would still have been under legal duty of paying over the exact same sum to his successor and might have used community funds for that purpose; that, if he had not paid it at all, the county might have brought a civil action to recover the money. But while money received by one member of a community will create, presumptively, a community obligation, still it may always be shown that the community did not receive any benefit therefrom, and in a suit by a county against a public officer to recover funds received by him as such, it could be shown, by way of defense, as in this instance, that the funds were lost through the failure of the bank in which they were deposited and therefore, the community received no benefit therefrom, so that, were we willing to apply the principle contended for, still, under the facts found here, there was no community liability.

Upon the question of interest, raised by the defendant's cross-appeal, it may be admitted that, as a general rule, unliquidated damages do not bear interest, especially in cases where the amount cannot be calculated or ascertained before judgment; but we here have a demand for a known specific amount, i. e., the sum wrongfully obtained, which may be lessened by the facts then existing and capable of ascertainment as to the financial condition of the bank, and we think the facts in this case bring it within the rule laid down in *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162; *Eilers*

Music House v. Hopkins, 73 Wash. 281, 131 Pac. 838, and *Sweeney v. Lewis Const. Co.*, 74 Wash. 303, 133 Pac. 441.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15983. Department Two. January 10, 1921.]

G. W. CAPPS *et al.*, *Appellants*, v. WESTERN TALC COMPANY, *Respondent*.[1]

MINES AND MINERALS (16, 17) — CONVEYANCES — LEASE. A talc mining lease will be forfeited in accordance with the stipulation of the parties, requiring continuous operation, where the lessee did not attempt to operate the mill in any commercial sense, but only technically to comply with the requirements of the lease.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 31, 1920, dismissing an action to forfeit a lease, after a trial on the merits to the court. Reversed.

R. M. Dye, for appellants.

MAIN, J.—The purpose of this action was to have declared forfeited a leasehold right in certain real estate. The cause was tried to the court without a jury and resulted in a holding denying forfeiture. From the judgment dismissing the action, the plaintiffs appeal. Upon this appeal we have not been aided by any brief filed by the respondent.

The facts may be summarized as follows: The appellants, being the owners of certain real estate in Lincoln county, upon which there were deposits of talc ore, on January 12, 1907, leased the premises to one Douglas F. Smith for a period of twenty-five years and

[1]Reported in 194 Pac. 554.

as much longer as the lessee or his assigns should continue to operate in good faith and in miner-like manner the premises for the purpose of mining, milling, and removing talc therefrom. The lease was subsequently assigned to the respondent, the Western Talc Company, a corporation, and it thereupon took possession of the premises and did some prospecting during the year 1917. Under the terms of the lease, the lessee or his assigns were required, not later than April 1, 1917, to commence, in good faith and in miner-like manner, to prospect and mine for talc; on or before the first day of June, 1917, to begin the construction, upon the premises covered by the lease, of a mill for the grinding of crude talc, and to equip same with machinery of a capacity of not less than ten tons of talc per day and have the mill completed and in full operation on or before September 1, 1917.

By subsequent agreement, the time in which the lessee would have to perform the conditions just mentioned was extended one year. In other words, the things set out as required to be done during the year 1917 were not required to be done until the corresponding dates of 1918. It will be assumed that these conditions were performed, even though it may be doubtful whether the mill was, on September 1, 1918, completed and equipped in such a manner as to satisfy the requirements of the lease. There was a further provision in the lease to the effect that, when the mill was constructed and equipped, the lessee should commence to mine,

"from said premises the talc located thereon and therein and shall continue such mining in good faith and in miner-like manner continuously with a force of men, equipment and machinery sufficient to show good faith and should the party of the second part cease to mine talc from such premises or operate said mill so

constructed thereon for a period of sixty days without first securing the written consent of said first parties (appellants) then and in that event this contract shall be null and void and all payments on account of talc removed shall be forfeited to first parties as liquidated damages."

The evidence shows that, approximately the first of September, 1918, a small amount of talc was milled. On November 20, 1918, as the respondent contends, or on the 19th, as the appellants contend, the mill was again operated and three or four hundred pounds of talc were passed through it. It was not operated again until February 18, 1919, when a few hundred pounds were milled. Whether it was again operated the last few days of March, the evidence is in dispute, the respondent claiming that it was; and the appellants, who had an equal opportunity to know facts, claiming that it was not.

The present action was begun early in April, claiming that the provisions of the lease which required that the lessee shall mine the premises for talc and shall continue such mining in miner-like manner continuously with a force of men, equipment and machinery sufficient to show good faith, were not complied with, and that the mill had not been operated as required by the terms of the lease. At the time the lease was made, the appellants had done certain development work upon the premises, and a ledge of talc rock containing probably four or five hundred tons of talc rock had been exposed. It was admitted by the manager of the respondent company that there was sufficient ore in this ledge to operate the mill for a period of two months continuously.

From the first of November, 1918, until the first of April, 1919, the respondent company employed only two miners in prospecting and development work.

Some other men were employed about the premises in building a tramway, but no other miners were employed. From the first of September, 1918, when the mill was completed until the first of April, 1919, a period of seven months, not to exceed ten or fifteen tons of talc were milled. The lease provided that, if the mill was not operated for a period of sixty days, this should be a ground of forfeiture. The evidence shows beyond controversy that the term of the lease requiring that mining operations should begin when the mill was constructed and equipped and should thereafter continue in a miner-like manner continuously with a force of men, equipment and machinery sufficient to show good faith, had not been complied with. While the mill, assuming that it was operated on the twentieth of December, 1918, instead of on the nineteenth, was not permitted to be idle for a period of sixty days, there was no attempt to operate it in the commercial sense. The only purpose of the operation was to technically comply with the requirements of the lease. The manager of the respondent company testified that the only object it had in starting and running the mill was to enable it to show that it had complied with the lease.

While forfeitures are not favored in the law, and a court of equity will be slow to declare a forfeiture, the evidence in this case shows plainly not only that the terms of the lease were not complied with, but that there was no attempt to comply with them in good faith. The parties having stipulated that, if the contract was not performed in good faith, it should be subject to forfeiture, a decree to that effect should be entered. The failure to adjudge the lease forfeited would enable the respondent to avoid its terms by a mere subterfuge.

The judgment will be reversed and the cause remanded with directions to the superior court to enter a judgment sustaining the prayer of the complaint.

Reversed.

HOLCOMB, C. J., MITCHELL, MOUNT, and TOLMAN, JJ., concur.

[No. 16025. Department Two. January 10, 1921.]

W. N. ROBESON, *Appellant*, v. G. G. NO-SKID'M TIRE BELT COMPANY *et al.*, *Respondents*.[1]

FRAUD (23)—ACTIONS—EVIDENCE—SUFFICIENCY. Fraud in misrepresenting a patent as a basic patent is not proven where it was shown that all the papers represented it only as a "new and useful improvement" of an older device.

SAME (6)—RELIANCE ON REPRESENTATIONS AND INDUCEMENT TO ACT. Damages for fraud in misrepresenting the usefulness of a patent cannot be recovered where plaintiff did not rely thereon, but being a practical mechanic, made his own tests and assisted in demonstrating.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 10, 1920, dismissing an action for fraud, after a trial on the merits to the court. Affirmed.

Kelleran & Hannan, for appellant.

Roberts & Skeel, for respondents.

MITCHELL, J.—This is an appeal from a judgment in favor of the defendants dismissing an action in fraud tried to the court without a jury.

The respondent corporation, by mesne assignments, had become the owner of a recent patent for a non-skid device for automobiles. In March, 1917, in Seattle, the appellant purchased the exclusive selling

[1]Reported in 194 Pac. 559.

rights in and to the device for the state of Indiana. He alleged he was induced to make the purchase by reason of representations on the part of the respondents that the device was the only one of its nature on the market or that had ever been used or invented, and that there were no prior patents or applications for patents for the same or any similar device, and that no such or similar devices were in use or known, and that said patent was and constituted a basic patent; that said device was valuable, practicable and suitable for the purposes and uses for which it was intended. In elucidation of the last mentioned representations, it was claimed at the trial that, in making the sale, representations were made that the device would be found effective for the use of automobiles in snow and ice. It was alleged the representations were material and made with the intent that appellant should rely thereon; that he did rely thereon and had no other source of information, and, but for such representations would not have made the purchase; that the representations were false and known by respondents to be false, and that thereby he was damaged, for the recovery of which the suit was brought.

The evidence shows that, prior to the date of respondent's patent, another one of a somewhat similar device had been granted, which respondents were aware of at the time of the sale to appellant, and of which appellant testified he was ignorant. However, it clearly appears by the issuance at a later date of the patent, now owned by the respondent, and also by other convincing evidence, that respondent's device consists of a pronounced patentable improvement over the other one, and that, in none of the many sections of the country of which inquiry had been made at the date of the trial of this cause, had there been any attempt at the manu-

facture or use of the appliance called for by the other and older patent. As to the alleged representation that nothing similar had ever been patented, the allegation is not borne out by the record. In the application for the patent, there was no claim of a primary or basic idea, but only a new and useful improvement. The inventors, in their specification for letters patent, declared they had invented, "new and useful improvements for non-skid devices for motor vehicles of which the following is a specification, etc."; and further on in the specifications, in several places, it is stated the invention relates to improvements only. The letters patent are, "for an alleged new and useful improvement, etc." While the patent is dated some three weeks prior to appellant's purchase, the testimony is not clear if the patent had been received by the respondent at the time of the sale to appellant, but, it does appear that all the other papers relating to the patent, including the specifications, were exhibited and offered by respondent to the appellant for examination. Appellant so admitted while testifying. It also satisfactorily appears that, during the negotiations leading to the sale to appellant, another party, associated with him and taking part in examining into the project, had possession of the same papers relating to the patent for several days, within the knowledge of the appellant. Upon the whole record, we are satisfied there was no attempt, on the part of respondents or either of them, to mislead as to the character of the patent, and that the representations made in that respect were, that the article covered by the patent was improvement only—secondary rather than primary or basic.

As to the charges of false representations concerning the usefulness of the device, and that it was suit-

able for use in snow and ice, appellant testified that after his purchase he made a test and found the device impracticable. There was testimony of experts who, after examination of the appliance, were of the opinion it was not a success. On the contrary there was testimony on the part of experts who, after examination of the appliance, were of the opinion it was worthy and practicable. However, the appellant is in no position to complain. He did not rely upon the representations and opinions of the respondents. He admits he is a practical mechanic and that prior to his purchase, he actually tested and assisted in demonstrating the device. His negotiations for the purchase extended over a period of two months. He saw the device and had it explained to him; he rode around on the wet streets on a number of different occasions in an automobile equipped with one, and was pleased with it; on one of these occasions there was snow on the streets; and he examined a large number of unquestioned written endorsements of reputable persons (many of whom resided in Seattle), who had tested the device or seen it demonstrated. There was an endorsement from one who had used the appliance in deep snow and mud. For some time appellant engaged in the sale of the stock of the respondent corporation, for a commission, and in doing so made use of the written endorsements above referred to. It was after this investigation and experience he made the purchase which he now claims was induced by his being overreached.

Some objection is made to the refusal of the trial court to consider certain testimony of representations, it is claimed were made to others by the respondent. Under the particular facts and admissions of the appellant, already in evidence at that time, there was no error in the ruling complained of.

We are convinced the judgment appealed from was right. Affirmed.

HOLCOMB, C. J., MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 16213. Department Two. January 10, 1921.]

NORTH COAST POWER COMPANY, *Appellant*, v. PUBLIC SERVICE COMMISSION OF WASHINGTON, *Respondent*.[1]

ELECTRICITY (1) — STATUTORY REGULATION — CONTRACTS WITH POWER COMPANIES—RATES—REASONABLENESS—POWER OF PUBLIC SERVICE COMMISSION—ORDER. Under Rem. Code, §§ 8626-27, 8626-28 and 8626-34, providing for reasonable rates for electrical companies and change of the same upon hearings before the public service commission, the law contemplates that the commission may by direct order terminate contracts which were outstanding at the effective date of the law; but as to contracts entered into subsequent to the going into effect of the law, it is not necessary to first obtain the affirmative consent of the commission to the filing of a new schedule increasing the rates to meet the situation where changed conditions make the increase necessary.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered August 18, 1920, affirming the order of the public service commission as to rates to be charged by an electric company, after a hearing on the merits. Reversed.

Lyle, Henderson & Carnahan and *Hayden, Langhorne & Metzger*, for appellant.

The Attorney General (*W. V. Tanner* and *Stephen V. Carey*, of counsel), for respondent.

McKenney & Fisk, amicus curiae.

MITCHELL, J.—The North Coast Power Company is a public service corporation having an electric generating and transmission system extending from Kalama,

[1]Reported in 194 Pac. 587.

Cowlitz county, Washington, northerly to Tenino, Thurston county, Washington, and southerly to Woodland in Cowlitz county. It serves most of the communities within that district. The city of Centralia is one of its customers. On October 1, 1915, the power company entered into a written agreement with the city of Centralia by which it undertook, at specified rates, to furnish, for a period of five years from that date, sufficient electrical energy to supply the distributing plant owned and controlled by the city, for the use and benefit of its inhabitants generally. On November 19, 1919, the power company issued, filed and published as required by statute, its tariff to become effective, by its terms, at the expiration of thirty days' publication, December 20, 1919, which fixed the rate, for the city of Centralia, higher than that mentioned in the agreement. On January 12, 1920, the city of Centralia filed with the public service commission its complaint wherein it attacked the new rates as greatly in excess of the contract charges and alleged that the new rates were excessive, exorbitant and uncalled for.

Upon issues joined upon the complaint, the matter was heard by the public service commission. The commission found that, upon a basis for rate making, that portion of the power company's property properly apportioned to the city of Centralia equalled such an amount that the power company sustained an actual loss of 3.4 per cent in serving the city of Centralia in the year 1919, under the rates fixed in the contract, and that, by applying the rate fixed in the new tariff, the company would have made in 1919, a profit of 1.97 per cent, which is not more than a reasonable return upon the investment, and that the rates, rules and regulations in the new tariff are not unjust, unreasonable, unfair nor more than sufficient. The commission

further found the existence of the five-year contract of October 1, 1915, not yet expired, and that the rates named therein are unjust, unreasonable, unfair and insufficient, and that the company should terminate the contract; and that the new tariff should become effective on July 1, 1920. Thereupon the commission ordered that the new rates be charged to the city after July 1, 1920, and that the power company forthwith terminate the contract referred to. The commission made a further order with reference to certain collections the power company had already made from the city after December 20, 1919, which is not involved in this appeal.

Upon the making of the order by the commission, the power company took the controversy to the superior court of Thurston county by a writ of review. Upon a hearing by the superior court the order of the commission was affirmed, in so far as it held and directed that the contract rates were effective until July 1, 1920, and that the new rates should be effective only from that date. The power company has appealed from the judgment of the superior court.

The contract in question having been entered into subsequent to the going into effect of the public service commission law, the issue presented is whether the rate for the service therein provided for was superseded and avoided by the filing by the power company of a new tariff, increasing the rates, and the statutory publication thereof for thirty days prior to the expiration of the period of time mentioned in the contract, without any direction by order of the public service commission.

Section 8626-26, Rem. Code, covering the duties of electrical companies, among others therein mentioned, provides that all charges made, demanded or received by any such company for electricity, or for any service

rendered, or to be rendered in connection therewith shall be just, fair, reasonable and sufficient. That is, all things considered, the charges shall not be so low as, among other things, to deprive the company of means to render adequate service, nor so high as to unduly burden the public.

Section 8626-27 of the code provides that electrical companies, among others therein mentioned, shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission shall prescribe, showing *all* rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges and service, used or to be used, and all general privileges and facilities granted or allowed by such company. To meet the situation where changed conditions make it necessary for the company to increase its charges, to provide means to render adequate service, § 8626-28 provides:

"Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. . . . When any change is made in any rate or charge, form of contract or agreement, or any rule or regulation relating to any rate or charge

or service, or in any general privilege or facility, the effect of which is to increase any rate or charge, then in existence, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or following the item in such schedule, such character to be in form as designated by the commission."

Upon this subject, we said in the case of *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 136 Pac. 850:

"So it is apparent that the affirmative consent, of the commission to change that rate in the manner provided by § 28 was not required, though the commission had the power to suspend and adjudge such new rate unreasonable and, in that manner only, prevent it becoming effective. The provisions of § 84 lend additional support to the view that the proposed new rate of the lighting company, which was properly noticed and filed, becomes automatically effective, subject to be defeated by the commission only in the manner already indicated."

Thus we find in §§ 27 and 28 the procedure defined for the exercise by the state of its general police power in those cases where a public service company requires additional revenue over its old charges to enable it to render proper service. But the plan is not without protection to those receiving the service, for, as provided by other sections of the law, such persons are entitled to make complaint against the increased charges while the commission of its own motion has the power to make complaint and to suspend, from time to time until the further order of the commission, the going into effect of a new schedule of rates and charges.

Unquestionably it was within the jurisdiction of, and it was the duty of, the public service commission to entertain the complaint of the city of Centralia because of its allegations that the new schedule of rates filed

and published by the power company were unfair, unreasonable and extortionate. But upon the hearing, and the findings made by the commission that the rates, rules, and regulations, named in the new tariff, were not unreasonable nor more than sufficient, there necessarily arose the question of the scope of the order to be made and entered. It was the understanding of the commission that, because of the unexpired five-year agreement between the power company and the city, the rate therein specified could not be increased, without and until there was affirmative direction by an order of the commission. The same theory seems to have been adopted by the superior court. The contention rests upon a construction entertained of § 34 of the public service commission law. That section provides:

"Nothing in this act shall be construed to prevent any gas company, electrical company or water company from continuing to furnish its product or the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order: Provided further, that the commission shall have no power to order the termination of any contract relating to the furnishing of water for irrigation or irrigation and domestic use, where such contract is based upon a consideration passing at the time of the execution of such contract." Section 8626-34, Rem. Code.

It is argued on behalf of the respondent that § 34 embraces two kinds of contracts with reference to

point of time in connection with the terms of the law, viz.: (1) Contracts outstanding at the effective date of the law; and (2) contracts entered into after that date which have not expired at the time it is proposed, a new schedule of higher rates shall go into effect by the filing and publication thereof. On the contrary, we are satisfied the plain intent of the language refers to only those contracts in force at the effective date of the law. Manifestly, the legislature, in framing the law, took notice of the existence of a number of outstanding contracts made by public service companies and adopted the policy of non-interference therewith, with the qualification, in consonance with the reserved authority of the state, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated. Accordingly, to avoid any question as to the effect the enactment of the law might otherwise have upon such contracts, it provided in effect for a continuance of those contracts. Then, bearing in mind the terms of § 27 of the law providing for the filing of schedules showing *all* rates and charges (which filing was required upon the going into effect of the law), and the terms of § 28 of the law providing for changes in schedules by notice to the commission and publication for thirty days, and intending that this plan should not interfere, it was further declared in § 34 with reference to the preventing of the operation of all contracts in force at the date of the law, as follows: "or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts." That is, as to all contracts existing at the date of the law, they should not be abrogated or suspended by either the going into effect of the law or a subsequent filing and

publication of a schedule, fixing a rate different from that named in such contract or contracts. They constitute a class of their own to be terminated only by an order within the discretion of the commission.

We conclude, therefore, that when the commission found that the rates, rules and regulations named in the new tariff filed by the power company were not unfair nor more than sufficient it should have ordered a dismissal of the complaint.

Reversed and remanded with directions to the lower court to enter a judgment, directing the public service commission to set aside its order and to enter one dismissing the complaint of the city of Centralia.

HOLCOMB, C. J., MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 16125. Department Two. January 10, 1921.]

ALICE WILSON *et al., Appellants,* v. MARY VAN HORN *et al., Respondents.*[1]

INFANTS (21)—ACTIONS—GUARDIAN AD LITEM—POWERS. A guardian *ad litem* to prosecute a suit for minors may employ counsel but has no authority to contract as to the amount of compensation, which must be fixed by the court.

GUARDIAN AND WARD (7)—CUSTODY AND CARE OF PROPERTY—CONTRACTS—SERVICES. A general guardian for infants has no authority to encumber the ward's estate without authority of the court, or make a contract with an attorney for an interest in real property recovered by suit.

Appeal from a judgment of the superior court for Lincoln county, Truax, J., entered January 21, 1920, after a trial on the merits to the court, dismissing the complaint and quieting defendants' title in an action for partition. Affirmed.

[1]Reported in 194 Pac. 560.

R. M. Dye, for appellants.

F. H. McDermont and *G. B. Quackenbush,* for respondents.

MOUNT, J.—This action was brought by the plaintiffs for partition of certain described lands. The complaint alleged ownership in plaintiffs of an undivided one-half interest in and to the lands and as tenants in common with the defendants. The defendants for answer to the complaint denied that the plaintiffs had any interest in or to the described real estate. As a first affirmative defense, they alleged the matter had been adjudicated; as a second affirmative defense, that certain agreements, signed by two of the defendants, were obtained by fraud, overreaching and by undue influence. These affirmative defenses were denied by the plaintiffs. Upon the trial of these issues, the court dismissed the complaint and entered a decree quieting title in the defendants. The plaintiffs have appealed from that judgment.

The basis of appellants' claim is a contract which was entered into on March 9, 1915, between Christina A. Van Horn, as general guardian for her three minor children, and the appellant W. A. Wilson, by which contract it was agreed that Mr. Wilson should have one-half of any sum or interest recovered in a suit to recover certain land which had been sold by the general guardian to one Mr. Nestoss. That action was prosecuted by Mr. Wilson and Mr. McDermont, who were then partners in the practice of law, and resulted in a judgment in favor of the plaintiff in that action. See *Van Horn v. Nestoss,* 99 Wash. 328, 169 Pac. 807. Before that action was brought, it developed that the general guardian had interests adverse to her minor children and a guardian *ad litem* was appointed to bring the action and it was prosecuted in the name

of the minor children by the guardian *ad litem*. After final judgment had been entered in that action, according to the judgment of this court, in *Van Horn v. Nestoss, supra,* it appears that Mr. McDermont and Mr. Wilson had dissolved their copartnership. Mr. McDermont filed an application to the trial court, asking that the attorney's fee be fixed. A show cause order was issued and upon a hearing the court fixed the attorney's fee in that case at $2,500 and enjoined the Van Horns from in any manner encumbering the land in question until the attorney's fee was paid. After this order was entered, Mr. Wilson filed a motion to vacate the order. This motion was denied and an appeal was taken to this court. The appeal was dismissed. Mr. Wilson now claims an undivided one-half interest in the land recovered in that action and seeks in this action to have it partitioned, one-half to himself and wife and the other half to the Van Horn heirs.

No fee was ever agreed upon between the guardian *ad litem* and the attorneys who represented the plaintiffs in *Van Horn v. Nestoss, supra.* The contention of the appellant is, in substance, that the contract entered into by the general guardian and Mr. Wilson on March 9, 1915, gives him a one-half interest in the real estate recovered in that action. We are satisfied that the trial court was right in denying a partition of the real estate involved in this case, for two sufficient reasons: First, there was no contract with the guardian *ad litem,* who brought the original action. The court, upon application therefor and a hearing, fixed the fees to be allowed counsel in that case. In the case of *Plummer v. Northern Pac. R. Co.,* 98 Wash. 67, 167 Pac. 73, which was a case where a guardian *ad litem* had entered into a contract to pay attorneys

one-half of the amount which might be recovered, we said:

"The proper rule in cases like the present is that a guardian *ad litem* appointed to bring suit for an infant has power to employ and select counsel, but has no authority to contract with them in regard to their compensation; that the amount of compensation to be paid the attorneys is a question to be submitted to the court and determined by it in view of all the circumstances attending the particular case."

It follows from the decision in that case that the guardian *ad litem* had no authority to bind the minors for an attorney's fee. It was for the court to determine what was the reasonable fee and order it paid. The trial court did so in this case. That order necessarily excluded the contract fee with the general guardian.

Second, the general guardian had no authority to encumber her wards' estate without authority of the court having jurisdiction thereof. Sections 1664, 1665, 1666 and 1667, Rem. Code. See, also, § 216, ch. 156, Laws of 1917, p. 705. In the case of *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924, this court said:

"It is immaterial that the attorney is by agreement to receive a part of the sum which may be recovered. Without an express stipulation to that effect, an agreement for a contingent fee will not act as an assignment, and no interest in a future judgment exists without an assignment. 4 Cyc. 990."

And in *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L. R. A. (N. S.) 1215, this court said:

"Without an express stipulation to that effect, an agreement for a contingent fee will not act as an assignment of a part of the claim, and no interest in a future recovery exists without an assignment."

It follows that, if there can be no interest in the future recovery without an assignment where a money judgment is obtained or money settlement made, clearly there could be no interest in real estate where the recovery was real estate.

Either one of these reasons is sufficient to defeat the partition as prayed for in this case. The judgment must therefore be affirmed.

HOLCOMB, C. J., MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15915. Department Two. January 10, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. TOM McCHESNEY, *Appellant*.[1]

CRIMINAL LAW (347)—MOTION FOR NEW TRIAL—MISCONDUCT AFFECTING JURORS. Affidavits of a juror stating facts constituting misconduct, but not attempting to state what effect it had on the jury, do not come within the rule that a juror will not be heard to impeach his own verdict.

SAME. Misconduct of a juror will not be considered as ground for a new trial where the affidavit of the juror denies the alleged misconduct.

SAME. A new trial in a prosecution for stealing cattle must be granted, where one of the jurors admitted to the making of statements in the jury room as to his loss of cattle, traced to the vicinity of the defendant's residence, which were entirely outside of the evidence and might be extremely prejudicial.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered December 11, 1919, upon a trial and conviction of grand larceny. Reversed.

Edward A. Davis, for appellant.

E. M. Gibbons and *C. M. O'Brien*, for respondent.

[1]Reported in 194 Pac. 551.

TOLMAN, J.—Appellant was tried and convicted upon a charge of grand larceny. A motion for a new trial was interposed, denied by the trial court, and from a judgment and sentence this appeal is prosecuted.

The only question raised here is the ruling of the trial court on the motion for a new trial. The motion was supported by the affidavits of two of the jurors who tried the case, to the effect that one of the other jurors, after the jury was empaneled and before the evidence was all received, said in the presence of the other jurors, or some of them:

"That he had lost $1,000 worth of cattle in one summer and he knew where they went, and that he had traced them as far as Kahlotus where the defendant lived; that a fellow told him not to let his cattle get on the east side of Sulphur Lake or they would be in Utah where the defendant has a homestead, or might be in Canada;"

and repeated the same statement in the jury room while the jury was deliberating, and was most insistent upon conviction, saying further:

"That they had just as well cinch Tom McChesney for if they didn't his brothers-in-law were going to."

And that still another juror in the cause, during such deliberation, said:

"That he had been upon another jury where the defendant was tried and that they had acquitted the defendant once and therefore they didn't want to do it again; that two other jurors made the same statements."

An affidavit made by appellant's attorney was also filed with the motion, stating where the appellant and the various jurors lived, the location of the town of Kahlotus, Sulphur Lake, etc., to show the meaning and effect of the statements alleged to have been made. The state submitted the affidavits of the jurors directly

named by way of answer, the material part of the first being as follows:

"That as one of the jurors in said matter I have read the affidavits of George L. Cutler and Emil Swanson, two other jurors who were empaneled to try said cause, and affiant alleges that he did in fact say, that he had lost some cattle in one summer, and that they disappeared, and that he had traced the wagon track to the town of Kahlotus, Washington; but affiant denies that he made any statement to said jurors or to any one else that defendant Thomas McChesney or any other person had taken said cattle, and in fact affiant did not know the said defendant Thomas McChesney and had never heard of him, and did not know that anyone had ever charged said McChesney with larceny of any property and affiant alleges that when he was sworn to try said cause, that he had never heard of said cause and that said defendant was not known personally to affiant, and affiant had no personal interest in said matter, and knew none of the facts in said matter, and his conviction and verdict that said defendant Thomas McChesney was guilty of the charge of stealing a saddle was based entirely upon the evidence adduced at the trial and the instructions of the court, and affiant was not influenced by statement that he had lost some cattle, as in fact, affiant did not know they were stolen or not, and affiant further alleges that someone told him that he had better keep his cattle on the west side of Sulphur Lake, as they might disappear, but affiant's informant did not make any charges or intimated who might be responsible for the disappearance of his cattle, and such statement did not influence affiant in arriving at his verdict in said cause, and affiant did not try to influence any other juror or jurors, in any way or manner, except upon the evidence adduced at the trial while the jury was deliberating."

The affidavit of the second juror named was a direct denial of having made the statement attributed to him, coupled with an admission that he had been a juror in

another criminal case against the same defendant tried at the same term of court in which case the defendant had been acquitted, but asserting that he was not prejudiced by that fact.

It will be observed that the affidavits upon which appellant relies, purport to state facts constituting misconduct, and do not attempt to state what effect this alleged misconduct had upon the jury, and therefore do not come within the rule that a juror will not be heard to impeach his own verdict. *State v. Parker,* 25 Wash. 405, 65 Pac. 776; *Marvin v. Yates,* 26 Wash. 50, 66 Pac. 131; *Ralton v. Sherwood Logging Co.,* 54 Wash. 254, 103 Pac. 28; *State v. Aker,* 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972. As we have seen, the reply affidavit of the second juror involved, denies the statement attributed to him, and therefore the alleged misconduct on his part will not be further considered. *State v. Underwood,* 35 Wash. 558, 77 Pac. 863; *State v. Moretti,* 66 Wash. 537, 120 Pac. 102.

We have carefully weighed the language of the reply affidavit of the first juror involved, and cannot find in it more than a partial denial of the facts charged as constituting his misconduct. The direct admissions contained therein of the fact that he had told the jury that he had lost some cattle, that he had traced a wagon track to the town of Kahlotus, presumably as a part of his search for the lost cattle, and that he had been informed that he had better keep his cattle west of Sulphur Lake or they would disappear, in view of appellant's residence being at Kahlotus, and the other facts known to the jury, might well give his hearers to understand that, by innuendo at least, he intended to accuse appellant of the theft. As all of this was wholly outside of the evidence in the case and might be extremely prejudicial, we think this case falls within

the rule of *State v. Parker, supra,* and reluctant though we are to disturb a verdict which has the approval of the trial court, yet, because of the facts undenied and admitted, which constitute misconduct, we must hold that a new trial should have been granted.

Reversed with directions to grant the motion for a new trial.

HOLCOMB, C. J., and MITCHELL, J., concur.

[No. 16224. Department Two. January 10, 1921.]

PARROTT & COMPANY, *Respondent,* v. E. F. BENSON *et al., Appellants.*[1]

CONSTITUTIONAL LAW (45)—POLICE POWER—NATURE AND SCOPE. The police power includes all regulations designed to promote public convenience, general welfare and property and great public needs, and it is not necessary for the court to find the existence of facts, if a state of facts can be reasonably presumed to exist which would justify the legislation.

SAME (48, 49)—POLICE POWER—REGULATION OF OCCUPATION—REASONABLENESS. Rem. Code, § 5466-1, requiring places using eggs imported from foreign countries to post conspicuous notices of such fact where customers could read them, is not unjust discrimination or an unreasonable restriction, but is within the police power.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered September 20, 1920, in favor of the plaintiff, in an action for an injunction, after a trial to the court on the merits. Reversed.

The Attorney General and *Frank P. Christensen, Assistant,* for appellants.

Kerr, McCord & Ivey, for respondent.

Poe & Falknor, amici curiae.

[1]Reported in 194 Pac. 986.

TOLMAN, J. — The respondent, as plaintiff below, brought this action to restrain appellant Benson, as commissioner of agriculture for this state, and appellant Adams, as chief of the division of the department of agriculture having direct charge of such matters, from enforcing the provisions of Laws of 1919, p. 290, ch. 120, and Laws of 1915, p. 274, ch. 94. The trial court reached the conclusion that a portion of subdivision (c) of § 1 of the act of 1915, was unconstitutional, and accordingly entered a decree perpetually restraining appellants and their successors in office from undertaking to enforce that portion of the act of 1915 held to be unconstitutional. This being an appeal by the defendants only, the 1919 act is not now in question, and we are called upon here to consider nothing beyond that portion of the act of 1915 held by the trial court to be unconstitutional. The act in question is entitled:

"An act relating to and regulating the sale of eggs, providing for the classification, labeling and marking thereof and providing penalties for violation thereof."

Section 1 of the act is here set out in full, and that portion thereof found to be objectionable by the trial court is italicized so that the particular features thought to be unconstitutional may be shown in their relation to the entire section:

"Section 1. For the purpose of this act, eggs shall be classified and branded as follows:

"(a) Cold storage eggs shall include all eggs which have been in cold storage for more than ninety days, and before being offered for sale shall be branded or stamped with the words 'storage.'

"(b) Preserved eggs shall include eggs in which the natural deterioration has been prevented or retarded by any means, process or treatment whatsoever, and before being offered for sale shall be branded or stamped with the word 'preserved.'

"(c) All eggs imported into the state of Washington from foreign countries shall be sold as such. The case or container in which they are shipped shall have the words 'foreign eggs' displayed thereon in letters two inches high. All retailers of said eggs shall sell them from the container in which he received them and shall inform each purchaser that said eggs are foreign eggs. *All restaurants, hotels, cafes, bakeries and confectioners using or serving foreign eggs must place a sign in letters not less than four (4) inches in size in some conspicuous place where the consumer entering their place of business can see it, to read 'we use foreign eggs.'*

"(d) Incubated eggs shall include all eggs which shall have been subjected to incubation whether natural or artificial for more than forty-eight hours and it shall be unlawful to expose or offer for sale or sell incubated eggs." (Rem. Code, § 5466-1.)

The objections to the act, urged below and here, are that it violates the provisions of the Federal constitution, which places the power exclusively in Congress to regulate commerce with foreign nations and among the several states, and that it is an unreasonable restriction, an invalid exercise of the police power, and an unjust discrimination in favor of the citizens of this state.

Two similar cases were relied on and followed by the trial court. *Ex parte Foley,* 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A 180, decided by the supreme court of California, and *State v. Jacobson,* 80 Ore. 648, 157 Pac. 1108, L. R. A. 1916E 1180, decided by the supreme court of Oregon, at about the same time. It appears that both the California and Oregon statutes there under consideration purport to deal only with imported eggs, while our statute by its terms covers all classes of eggs, but we place no special reliance upon that difference. The California case is reasoned upon the theory that the act does not protect the consumer

from ignorantly purchasing stale or unwholesome eggs, since eggs not imported and not required to be branded, and whose qualities the law does not require to be made known, may be still more stale and unwholesome; that imported eggs are not necessarily unwholesome or stale, and that therefore the act was not a valid exercise of the police power to prevent imposition and fraud upon the egg purchasing and egg consuming public. The Oregon case is reasoned almost wholly upon the theory that the act there involved was an attempt to regulate foreign commerce in violation of the Federal constitution, and it is assumed rather than reasoned, that it was not thereby intended to prevent the sale of impure or unwholesome food.

We find ourselves unable to agree with either view. We are already committed to the doctrine that the police power includes within its scope not only the public health, public morals, and public safety, but also all regulations designed to promote public convenience, the general welfare, and general prosperity, and all great public needs and

"In determining whether the provisions of the law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power." *State v. Pitney,* 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A 209; *Fisher Flouring Mills Co. v. Brown,* 109 Wash. 680, 187 Pac. 399.

In the cases cited the authorities upon which this doctrine is based are collated and discussed and need not now be again reviewed.

It is apparent that California follows a different rule, as in the *Foley* case it was said:

"'Imported' eggs are not necessarily stale or unwholesome eggs, and the advertising of such eggs as coming from some place without the United States tends in no manner to protect the health of the Californian public;"

while under our doctrine we are bound to say that, unless it appears that imported eggs are in all respects equal to or better than domestic eggs and that no set of circumstances can exist which would justify the enactment of the law, then we must presume that the legislature had good and sufficient reasons for its enactment. While there is some evidence in the record tending to show that eggs imported from China are wholesome and equal to the domestic product, except in size, yet there is much tending to the contrary, purporting to show conditions under which eggs are produced, handled and shipped, which might well justify the consumer in exercising a choice between domestic and such foreign eggs, and all this act can do is to identify imported eggs, either as eggs or as ingredients in other merchandise, so as to permit of such choice. Surely if the foreign egg is entirely fresh and wholesome when placed upon our markets, it can stand upon its own merits and win its way to popular favor under its true designation. We cannot hold anything to be unjust discrimination, or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is. *Hathaway v. McDonald,* 27 Wash. 659, 68 Pac. 376, 91 Am. St. 889; *Hutchinson Ice Cream Co. v. Iowa,* 242 U. S. 153, 61 Law Ed. 217.

The Oregon court, in *State v. Jacobson, supra,* seems to have wholly lost sight of the fact that the portion of the act we are now considering can only operate after

the eggs have lost their status as articles of foreign or interstate commerce, and have become a part of the great mass of domestic property as completely as though produced within our borders. Surely, when an egg reaches a restaurant, hotel or bakery and is taken from the package, cooked or mixed with other ingredients, and served to the guest or purchaser as food, it requires no argument or authority to establish beyond cavil that it is no longer an article of foreign commerce over which Congress alone has control; otherwise no article once brought from without into the state, no matter how changed by any conceivable process, could ever become subject to state legislation; but authorities are as numerous as the question is simple. *In re Agnew,* 89 Neb. 306, 131 N. W. 817, Ann. Cas. 1912C 676, 35 L. R. A. (N. S.) 836; *Weigle v. Curtice Brothers Co.,* 248 U. S. 285, 63 Law Ed. 242; *Armour & Co. v. North Dakota,* 240 U. S. 510, 60 Law Ed. 771.

We conclude, therefore, that the portion of the act of 1915, now under consideration is not subject to the objections urged here, and since it is well settled that the courts will not declare a statute to be unconstitutional, unless its conflict with the constitution is plain beyond a reasonable doubt, we are constrained to hold that the learned trial court erred in the results reached. The judgment appealed from is reversed with directions to dismiss the action.

HOLCOMB, C. J., MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 16033. Department Two. January 14, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. ROY McDERMOTT, *Appellant*.[1]

BURGLARY (19)—EVIDENCE—SUFFICIENCY—FELONIOUS INTENT ON ENTRY. In a prosecution for burglary, there was sufficient evidence of entry with intent to commit the crime of contributing to the delinquency of a female under the age of eighteen years, where it appears that accused, after being ordered from a hotel at night, reentered by the fire escape, gained access to a room occupied by a girl seventeen years of age, and was found there with others, who were drunk, and that accused had been drinking.

CRIMINAL LAW (244)—TRIAL—MISCONDUCT OF ATTORNEY—CORRECTION BY COURT. Error cannot be predicated upon misconduct of the prosecuting attorney in his closing address, where, upon exceptions taken, the trial court instructed the jury to disregard any statement which was not borne out by the evidence.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 15, 1919, upon a trial and conviction of burglary. Affirmed.

E. C. Dailey and *A. E. Dailey*, for appellant.

Thos. A. Stiger and *Q. A. Kaune*, for respondent.

MAIN, J.—The defendant was charged by information with the crime of burglary in the first degree. The trial resulted in a verdict of guilty as charged. From the judgment entered upon the verdict, the defendant appeals. In submitting the cause to the jury, the trial court, in the instructions, defined the crime of burglary in the first degree and stated what must be found before a verdict of guilty could be returned. The jury were also told that, if the defendant had entered the building and room where the crime is claimed to have been committed with intent to give a woman under eighteen years of age intoxicating liquor

[1]Reported in 194 Pac. 780.

or encourage her in the use of that liquor or if he entered with the intention of occupying a bed with her, this would be contributing to the delinquency of a female under eighteen years of age, and therefore a crime. No exception was taken to the instructions. It is not claimed that the law was not therein correctly stated.

The appellant's first point is that there is no evidence showing the commission of a crime or an intent to commit a crime. While the evidence was in dispute upon some, at least, of the material questions, the jury were justified in believing that the facts supported by competent evidence were substantially as follows: On the evening of April 27, 1919, a young woman, then seventeen years of age, registered at a reputable hotel in the city of Everett and was assigned a room. The appellant had become acquainted with this young woman three or four days before. During the evening, or night, the appellant was observed about the hotel by the night clerk and was then thought to be a guest therein. At about four o'clock on the morning of the 28th, the appellant, with two other men, entered the hotel and started up the stairway when they were accosted by the night clerk and directed to leave the place. Shortly after this, they entered the hotel by means of the fire escape, passing through a window into one of the halls, from which they entered the room occupied by the young woman. At about five o'clock in the morning, they were discovered in this room and the night clerk called the police to cause them to be ejected from the hotel. When the police officers entered the room, the young woman was in or on the bed, the two men other than the appellant were about the room and the appellant was in the closet clothed only in his "B.V.D.'s," as the evidence states. There was a whiskey bottle in the room prac-

tically empty. The evidence is that the two men other than the appellant were drunk, that the woman was dead drunk, and that the appellant had been drinking. From this evidence, the jury had a right to conclude that the defendant, together with the other men, entered the room for the purpose of committing a crime therein, to wit: contributing to the delinquency of the female child under the age of eighteen years.

The second point is that the attorney for the state, in his closing address to the jury, was guilty of misconduct. In stating the exceptions, reference was made to certain language. This language does not appear otherwise in the record than as is stated in the exceptions. Accepting the facts to be as stated, there was no prejudicial error. When the matter was called to the attention of the trial court, the jury were instructed to disregard any statement made by counsel which was not borne out by evidence. The question as to whether the defendant entered the hotel and room for the purpose of committing crime therein was squarely presented to the jury by the instructions, and the evidence, if believed by the jury, was sufficient to sustain the verdict.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 16126. Department Two. January 14, 1921.]

MINNIE CRAMER, *Respondent*, v. GEORGE H. CLARK *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (174)—REMEDIES OF PURCHASER—RIGHT OF ACTION—BREACH OF CONTRACT. Where defendants agreed to cause to be conveyed to plaintiff, in a trade, property of the value of six thousand dollars, they are liable for breach of the contract, and it is immaterial whether they made any specific representations as to the property.

SAME (186)—REMEDIES OF PURCHASER—DAMAGES—MEASURE—DIFFERENCE BETWEEN LAND AS REPRESENTED AND ACTUAL VALUE. Where defendants agreed to cause to be conveyed to plaintiff, in a trade, property of the value of six thousand dollars, and conveyed property of little value, the measure of damages is the difference between the value of the property transferred at the time of the sale, and what its value would have been if as represented.

SAME (18)—EVIDENCE OF DAMAGE—SUFFICIENCY. On a trade of property, the value of thirty acres received by plaintiff is a question for the jury, where witnesses on one side testified it was worth $125 per acre, and on the other side that it was poor land and not worth over $50.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered January 28, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for fraud and breach of contract. Affirmed.

Cordiner & Cordiner, for appellants.

Peacock & Ludden, for respondent.

MAIN, J.—The plaintiff brought this action seeking to recover damages which she had sustained in a real estate transaction with the defendants. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $3,867.50. Motion for new trial being made and overruled, judg-

[1]Reported in 194 Pac. 779.

ment was entered upon the verdict and the defendants appeal.

The appellants, George Clark and May Clark, are husband and wife, and were engaged in the real estate business in Spokane under the name of G. H. Clark and Company. The respondent, prior to the transaction in question, lived in Missoula, Montana, and there owned an equity in certain real property which was of the value of approximately six thousand dollars. During the month of March, 1918, she entered into an agreement with the appellants whereby she conveyed, or caused to be conveyed, her interest in the Missoula property to the appellant Kempf. In return for this, the appellants agreed, or the jury, from the evidence, had a right to find that they agreed, to secure and convey to her property of equal or greater value. In return for the Missoula property, respondent received from the appellants certain property at Hillyard, Washington, and thirty acres of land in southern Idaho. She moved from Missoula to Hillyard, Washington, and after a time discovered that, for her six thousand dollar equity in the Missoula property, she had received property of very little value.

This action was thereupon begun. From the complaint it is not clear whether the theory of the action was to recover damages for false and fraudulent representation, or was based upon a contract whereby the appellants agreed to secure for the respondent property of at least the value of six thousand dollars. While the evidence in support of the plaintiff's case in chief was being presented, there was some controversy over what was the exact theory of the action. After the respondent rested, the appellants moved the court to require her to elect upon which theory the action was being prosecuted. This request was sustained,

and the respondent thereupon elected to rely upon the contract theory. The appellants, in their opening brief, state and argue separately twenty-three different points. Of course, in the ordinary case—and the present case is only that—the space allowed to an opinion would not justify the discussion of any such number of questions.

In this opinion there will be discussed only the three points upon which, it seems to us after careful consideration of all the questions, the appellants must principally rely. The first of these is that there is no evidence to connect the appellant Kempf with the Hillyard property. The evidence on the part of the respondent shows—and the jury had a right to believe it—that he was present on two or more occasions when the transaction was being discussed and considered, that he was a party to the arrangement and that he received title to the Missoula property. If he were a party to the agreement whereby the respondent was to receive property of at least the value of six thousand dollars in exchange for her Missoula property, it would not matter whether Kempf himself made any specific representation with reference to the Hillyard property. By the terms of the agreement, he was required to see that the respondent received what she had contracted for.

The next point is that there was error in the instructions upon the measure of damages. The court instructed the jury that the measure of damages was the difference between the market value of the respondent's interest in the Missoula property and the market value of the Hillyard and Idaho property, as well as any other property which was transferred in pursuance of the agreement. In support of the contention on this point, the appellants rely upon the rule that, where damages are sought to be recovered for

fraudulent representation, the measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented, citing cases of *Hunt v. Allison,* 77 Wash. 58, 137 Pac. 322, and *Parkhurst v. Elliott,* 103 Wash. 89, 173 Pac. 731. Whether this rule is applicable to the facts in this case, since the theory of the action became one upon an alleged contract, it is not necessary here to determine, because the measure of damages would be the same under the particular facts of this case. If the appellants agreed to cause to be transferred to the respondent property of the value of six thousand dollars and failed in this, the measure of damages would be the same whether the difference between the market value of the property as transferred and the value of the Missoula property were considered, or whether the rule were applied where the measure of damages is the difference between the value of the property transferred and what its value would have been had it been of the value represented. The represented value here, under the evidence, was only to be equal to the value of the Missoula property, or six thousand dollars.

The next point is that there is no evidence in the record to show that the Idaho property is worth less than the sum of three thousand dollars, which was the value represented at the time of the transaction. Appellants offer testimony to the effect that this land was good farm land and worth from one hundred to one hundred and twenty-five dollars an acre. The respondent offered testimony that it was poor land, very rough and very rocky, with no farm land on it. In addition to this, there was evidence from which the jury had a right to infer that, at the time of the transfer, the appellants did not deem the land to have a greater

value than the sum of five hundred dollars. While the evidence is not as clear and positive on the part of the respondent as it might have been, yet we think that there was sufficient to take the question to the jury, and that the court would not be justified in deciding, as a matter of law, that this evidence did not present a question of fact. As already intimated, the other questions will not be discussed *seriatim*. It is sufficient to say that they have all been considered and in none of them is substantial merit.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 15964. Department Two. January 14, 1921.]

NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*, v. MARTIN C. HOVEN, *Respondent*.[1]

PUBLIC LANDS (96)—DISPOSAL BY STATE OF TIDE AND SHORE LANDS PREFERENTIAL RIGHTS—ABUTTING OWNER. The owner of a ferry is not entitled to any preference right to shore lands in a navigable stream by reason of improvements of his predecessors in the construction of a wharf thereon, where it had served no useful purpose for over twenty years and had disappeared more than ten years ago.

SAME (98)—PREFERENTIAL RIGHTS—IMPROVER. The owner of a ferry is not entitled to any preference right to purchase shore lands in a navigable stream by reason of having maintained since 1908 or 1909, by permission of the city, a temporary float within the limits of a street extended into the water.

PUBLIC LANDS (119) — NAVIGABLE WATERS (32) — SHORES AND BANKS—RIGHT OF OWNERS—INJUNCTION. The abutting owner, entitled to a preference right to purchase shore lands on a navigable stream, is entitled to an injunction against a stranger to prevent threatened acts of trespass by way of permanent obstructions cutting off his access to the stream.

[1]Reported in 194 Pac. 790.

Appeal from a judgment of the superior court for Cowlitz county, Reynolds, J., entered February 2, 1920, dismissing an action for an injunction, after a trial on the merits to the court. Reversed.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and *A. H. Imus,* for appellants.

W. H. Abel and *Homer Kirby,* for respondent.

MITCHELL, J.—The Northern Pacific Railway Company, since 1891, has been the owner of certain lands bounded on one side by the meander line of the Columbia river, in the city of Kalama, whereon is situated its tracks, station buildings, and wharves used for railroad purposes. This tract of land is intersected at right angles by Fir street, a public street of the city, which leads down to the water in the river. The river at this point runs northerly. For some years there has been an outstanding contract between the railway company and one John Reid in connection with the railway company's business by which Reid has been engaged by the use of small boats in transporting passengers and baggage for the railway company's patrons across the river to connect with other trains operating on that side of the river. The railway company's tracks run near the shore of the river. Its tract of land has been divided into lots and blocks. For the carrying out of the transportation agreement referred to, the railway company leased to Reid, and put him in possession of, that portion of lot 1, block B, of the railway company's plat which lies between its railway station platform and the river, and abutting upon the northern margin of Fir street. The land leased extends about twenty-five feet north and south, and is used in connection with Reid's business of carrying passengers and baggage across the river.

For ten years or more at the time this suit was commenced, Martin C. Hoven, the defendant, has been operating a public ferry across the river. His landing consists of a float between piles, and an approach to the land. It is located, by permission of the city council, at the foot of Fir street and within the marginal lines thereof as projected out into the river. Claiming the right as the successor in interest of former occupiers, the defendant threatened, prepared, and intended to improve and enlarge his float or landing place by the driving of piles and placing other permanent improvements on the north side of Fir street and immediately in front of the twenty-five foot strip used and occupied by Reid. Thereupon this action was brought by the railway company and Reid to obtain a preventive injunction restraining the defendant from placing and maintaining piles and other permanent fixtures in front of their property. The trial resulted in a judgment for the defendant, from which plaintiffs have appealed.

The place at which the respondent was intending to drive piles is situated between the meander line and the line of low water in the river, which is a navigable stream. The land has not been surveyed or platted by the state—that is, no plat thereof has been filed. The state owns the tide or shore land, under its assertion of title thereto contained in art. 17, § 1 of the state constitution. The appellants contend that, in virtue of the fact that the legislature has given the upland owner the preference right to purchase shore and tide lands lying in front of his uplands when such shore and tide lands shall be offered for sale by the state, they can maintain an injunction to prevent obstruction to the same by a trespasser, relying on Rem. Code, § 6750, and the rule laid down in the case of *West Coast Imp. Co. v. Winsor,* 8 Wash. 490, 36 Pac.

441. On the other hand, the respondent bases his claim upon the proviso to Rem. Code, § 6750, giving the preference right of purchase on account of valuable improvements in actual use prior to March 26, 1890, for commerce, trade, residence or business.

From the evidence it satisfactorily appears that certain persons, claimed by the respondent to have been his predecessors in interest, as early as 1874 built a wharf or landing place upon piles on these tide or shore lands, from a point at or near the south line of Fir street to a point sufficiently far to the north to be in front of the upland leased to Reid, and thereafter maintained and used the same until high water in the year 1894 practically destroyed it. It has not been rebuilt. There is a dispute in the evidence as to the last days of usefulness of any portion of the wharf that remained after the freshet of 1894. Much of the testimony shows it was entirely useless at all times after that date; and certainly the great weight of the testimony shows it had served no useful purpose to respondent, or his so-called predecessors in interest, for a period of twenty years prior to the time of the trial of this case and that, after the year 1894, the timbers and piles remaining gradually rotted away until for more than ten years no evidence of them was left other than a few piles or stubs of piles.

Respondent is entitled to no preference right to purchase from the state the tide or shore lands by reason of his having maintained, since 1908 or 1909, by permission of the city, a temporary float in Fir street extended into the water, for it is no part of the old wharf that existed on March 26, 1890. He cannot claim any preference right by reason of the existence of the old wharf and a so-called transfer to him in June, 1919, (a few days before the trouble arose between him and Reid over this area) of the pretended rights of some

former owner of the old wharf, because there was no wharf there at the date of the transfer to him, nor had there been any for a great many years. The respondent stands in the relation of a stranger to the area in dispute, against whose threatened act of trespass by way of permanent obstructions appellants are entitled to protection, under the rule in the case of *West Coast Imp. Co. v. Winsor, supra.*

Reversed and remanded, with directions to the superior court to enter a preventive injunction, as prayed for in the complaint.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 16068. Department Two. January 14, 1921.]

THE CITY OF WALLA WALLA, *Respondent*, v. A. M. JENSEN COMPANY *et al.*, *Appellants*.[1]

PARTY WALLS (2)—RIGHTS AND LIABILITIES. Where a party wall is built by one owner, and the other merely has an option to use it on paying half of the cost, the wall belongs to the builder.

EMINENT DOMAIN (59)—COMPENSATION—CONTINGENT OR PROSPECTIVE CONSEQUENCES OR LOSSES—PARTY WALLS. Upon condemnation of land up to a party wall, which was owned by the builder, the other owner having merely an option to use it on paying half the cost, the builder's damage is a matter of speculation and conjecture, where there is nothing to show any intention to use and pay for the wall.

SAME (89, 127)—COMPENSATION—MEASURE AND AMOUNT—LIMITED ESTATES—VALUE OF PARTY WALL. Upon the condemnation of a lot up to the line of a party wall, built and owned by one of the parties, the measure of damages is the amount above the actual value that a purchaser, willing but not compelled to buy, would pay for either piece of property for any purpose by reason of a party wall agreement giving the owner of the land condemned the option to use the wall on paying half its cost.

[1]Reported in 194 Pac. 804.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 5, 1920, upon findings in favor of plaintiff, awarding damages for the condemnation of property, after trial on the merits to the court. Affirmed.

Reynolds & Bond and *Evans & Watson,* for appellants.

H. B. Noland, for respondent.

MOUNT, J.—This appeal is from an order of the lower court awarding damages for property taken in a condemnation proceeding. The city of Walla Walla condemned a strip of land sixty feet wide for a street known as Colville street, across the property of Adolph Schwarz within the city. It appears that, in the year 1905, Mr. Schwarz entered into a contract with the Masonic Temple Association permitting that association to build a wall of brick and stone, one hundred and twenty feet in length, eighteen inches thick and two stories high, on the line between property then owned by each of the parties. This wall was placed nine inches on the property of each of the parties. The contract provided as follows:

"And whereas, the wall upon the easterly side of the said building, having been constructed at the sole expense of the party of the first part (Masonic Temple Association) upon its premises above described, and with the consent of said parties of the second part (Schwarz and wife) with the understanding that the said parties of the second part should have the right to the use of said wall at any time when they should erect a building upon their said premises upon payment of one-half of the value of that part of said wall which they might use in such construction and at the date of such construction:

"Now, therefore, it is . . . agreed . . . as follows:

"1. That the parties of the second part shall have the right to use all or any portion of the party wall constructed by the party of the first part in the building upon its premises herein described for the construction of a building upon the said premises of the parties of the second part, abutting upon and along said wall, upon payment to the party of the first part at the time of the commencement of such construction, of one-half of the value of that portion of said wall so used by the parties of the second part in such construction, the value of that part of said wall so used to be fixed as of the date of the commencement of such construction."

The street condemned by the city is located along this party wall, no part of which is taken. Sixty feet of Mr. Schwarz's property adjoining the wall is taken. The trial court found the value of the sixty feet taken to be $12,150 and that the damage to each of the parties to the wall agreement was one hundred dollars. This appeal is from that part of the award allowing one hundred dollars to the Masonic Temple Association and one hundred dollars to Mr. Schwarz.

At the trial, which was had upon stipulation to the court without a jury, the appellants offered evidence to the effect that, at that time, one-half the value of the wall was $3,162 to the Masonic Temple Association and that it would cost Mr. Schwarz to build a new wall of the same length and height $1,859. The appellants argue that the court erred in not finding the damages in accordance with these figures. It will be noticed that the party wall agreement provides that Mr. Schwarz shall have the right to use the whole or any portion of the wall upon payment of one-half the value of that portion of said wall so used, "the value of that part of said wall so used to be fixed as of the date of the commencement of such construction."

The wall was built and paid for by the Masonic

Temple Association more than fifteen years before this action was begun. No part of the wall has ever been used by Mr. Schwarz and there is no evidence in the record of any intention to use the wall or any part of it now or in the future. It is not claimed that he has ever used the wall or paid anything upon it. The wall, therefore, belongs exclusively to the builder. 30 Cyc. 787; 20 R. C. L. § 23, p. 1100.

No doubt the appellants Masonic Temple Association and Mr. Schwarz have some interest or property right in the party wall agreement, which right or interest will be taken away when the street is constructed, because then the street will abut upon the wall which cannot be used by any one except the Masonic Temple Association, thus preventing Mr. Schwarz from ever using the wall and the Masonic Temple Association from receiving anything for the value of the wall. By the terms of the contract, Mr. Schwarz is not bound to use the wall nor is any purchaser of his property. He has simply an option which he may or may not exercise at his discretion. The right of the Masonic Temple Association to receive anything is, therefore, a contingent right depending upon whether Mr. Schwarz or his assigns should ever desire to use the wall. The right is, therefore, a contingent right which may never have been accepted.

It is plain that one-half the value of the wall at this time is not the proper measure of damages, either to the Masonic Temple Association or to Mr. Schwarz, because the party wall is not now used as contemplated by the agreement and there is nothing in the record to indicate any immediate intention to use it, or that it ever will be used, even if the street were not to be constructed. Conceding that appellants are entitled to some damages, the amount is necessarily a matter of speculation and conjecture. In the case of *Hoffman*

v. Dickson, 47 Wash. 431, 92 Pac. 272, 93 Pac. 523, 125 Am. St. 907, 15 Ann. Cas. 173, where the owner of certain lots in Tacoma agreed to sell and convey by warranty deed and the purchaser afterwards discovered there was a lien by party wall agreement, the purchaser sought to require the seller to remove the lien. In that case, we said, at p. 437:

"Appellants insist that the cost of the walls should have been ascertained by the court and the respondents required to deposit one-half the amount thereof in the registry of the court to await the time for payment. Such a course would have been inequitable and impracticable. Respondents would have been required to deposit their money and appellants or their grantees might not for twenty years, and possibly never, have used the wall. The money would thus have been idle for an indefinite time. Moreover, the persons who shall ultimately be entitled to receive the payment will be entitled to be heard as to the amount when the same shall be determined. He was not present before the court, and even his identity could not then be known."

The lien in that case was afterwards defeated. See *Hoffman v. Dickson*, 65 Wash. 556, 118 Pac. 737, Ann. Cas. 1913 B 869, 39 L. R. A. (N. S.) 67.

So here, fifteen years have elapsed and the wall has not been used by Mr. Schwarz. If the street is not hereafter constructed, neither he nor his successors may ever use the wall. The persons who shall ultimately be entitled to use the wall will be entitled to be heard as to the value at the time the wall is used. It is apparent, therefore, that the value of the wall at this time is not the measure of damages. We are of the opinion that the true measure of damages in this case is how much more than the actual value of the real estate would a purchaser, willing but not compelled to buy, pay for either piece of property for any purpose by reason of the party wall agreement. There was no

evidence offered to that effect or upon which a guess might be made. The appellants relied upon the value at the present time which clearly was not the proper rule. The trial court evidently was of the opinion that the appellants were entitled to nominal damages and probably something more and for that reason assessed the damages at one hundred dollars. If this finding had been made by a jury after proper instructions, it is plain we would not disturb such finding. In view of the record that there is no showing of actual damages which are not a subject of speculation and conjecture, we are of the opinion the trial court was right.

The judgment is therefore affirmed.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15968. Department Two. January 14, 1921.]

F. W. WAGNER COMPANY, *Appellant*, v. JOHN L. CRAIB & COMPANY, *Respondent*.[1]

SALES (12, 126, 129)—VALIDITY—CONTRACT BY CORRESPONDENCE—DELIVERY—ACTION FOR DAMAGES—CONDITIONS PRECEDENT. Upon a sale of 100 tons of hay, delivery to commence about August 15, without specifying time for completion, the buyer's letter, after receiving the first shipment, to the effect that just at present it was not in need of further shipments, is not a repudiation of the order; and the seller must make a tender of the balance before bringing suit for breach of contract.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 23, 1920, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

V. O. Nichoson and *Nelson R. Anderson*, for appellant.

Byers & Byers, for respondent.

[1]Reported in 194 Pac. 584.

MITCHELL, J.—A general demurrer to the complaint in this action was sustained. The plaintiff refused to plead further, and has appealed from a judgment of dismissal.

In effect, the complaint alleges: That the appellant, engaged in business in Sunnyside, Washington, made to the respondent, engaged in business in Seattle, Washington, an offer by telegram on July 24, 1919, to sell hay "up to 500 tons at $26," shipping to start about August 15. That, on July 25, 1919, respondent answered by wire, confirmed by a letter the same day, saying: "we wired you today accepting the 100 tons of alfalfa at $26 f. o. b. shipping point, loading to commence around August 15"; and on July 30, 1919, respondent wrote:

"We have been expecting to hear from you in regard to our telegram and letter ordering 100 tons of alfalfa. Kindly let us hear from you and oblige."

That on July 30 or 31, 1919, appellant's manager, in person, at Seattle, notified respondent orally that its order had been booked. That on August 12, 1919, appellant shipped and delivered to the respondent 17,020 pounds of hay and gave notice thereof by letter on that day as follows:

"We are shipping you today S. S. & W. car No. 10838—143 bales alfalfa, 17,020 pounds. Your order did not state when we should start shipping and understood same to be when hay was ready. We will be loading one more today providing we can get cars. Kindly advise us if those shipments at this time are O. K."

That on August 13, 1919, respondent wrote to appellant as follows:

"We are in receipt of your letter of August 12th notifying us that you had shipped one car of alfalfa. We did not expect to get any hay from you as you never

replied to our letter of July 30th, when we wrote you asking for confirmation of our order of July 25th. Your telegram quoted 500 tons and we did not know whether you cared to sell less than this quantity. In the meantime we bought hay from other parties to cover sales we had made, so just at present we are not in need of more hay for immediate shipment."

That in answer to the last mentioned letter appellant on August 14, 1919, wrote:

"Your letter of yesterday regarding hay received and contents noted. In regard to the confirmation you speak of, the writer was in your city the same day you wrote this letter on confirmation, and was talking with you at the poultry association office, at which time I told you we would see that you received first class stuff on your 100-ton order, and that these shipments would have our personal attention both in loading and billing, and at that time you stated that would be all right. This confirmation the writer considered sufficient and booked your order accordingly. However, we have moved what we have baled at this time and will be pleased to take care of your order at a later date or whenever you order same shipped."

That thereafter, on September 13, 1919, appellant wrote:

"Hay baled on your contract. Would appreciate you taking delivery at this time," to which respondent answered, "Replying to your letter of September 13, we would refer you to our letter of August 13, which covers the point mentioned in your letter."

It is further alleged that the 17,020 pounds shipped on August 12, 1919, had been paid for; that appellant was at all times ready, able and willing to ship the balance of the 100 tons; that the market price of hay had declined five dollars per ton; and that the respondent wrongfully refused to accept the remainder to appellant's damage in the sum of $457.

It may be assumed, for the purpose of a decision of the case, upon what we think to be a controlling consideration, that there was a valid contract entered into for the sale of one hundred tons of hay. While the correspondence shows that delivery was to *commence* about August 15, 1919, it is silent as to how fast the hay should be delivered or when the delivery should be finally completed. In reply to appellant's letter of August 12, 1919 (the date of the small shipment) the respondent on the next day, by letter, after stating it did not expect to get hay from appellant because of lack of confirmation of its order for only one hundred tons while the original offer quoted five hundred tons, concluded by saying:

"In the meantime we bought hay from other parties to cover sales we had made, so just at present we are not in need of more hay for immediate shipment."

Clearly the last statement, coupled with the acceptance of the small shipment made the day before, did not amount to a repudiation of the contract, but only that at present more hay was not needed for immediate shipment. Promptly the appellant answered reminding the respondent of a former oral acceptance of the order, and advising respondent that at that date it had disposed of all of its baled hay "and will be pleased to take care of your order at a later date or whenever you order same shipped." Thereafter nothing was done until on September 13, appellant notified respondent it had "hay baled on contract. Would appreciate you taking delivery at this time."

The reply to this letter, by which the appellant was referred to respondent's letter of August 13 as covering the point mentioned, must be taken as meaning that respondent was "just at present not in need of more hay for immediate shipment." Thus it appears

that, after the small shipment on August 12, the appellant was not prepared to make any further shipment until September 13, at which time it suggested that it would appreciate respondent's taking the hay. But just at that time respondent was not needing any and, in the absence of some specific understanding as to the date of delivery and acceptance, it was necessary that appellant make a tender of the balance of the order in order to create a right of action for a breach of contract.

Where the obligations of the parties are mutual and concurrent, in order to fix the liability of the buyer, the seller must offer to perform upon his part by an actual tender of performance. *Underwood v. Tew,* 7 Wash. 297, 34 Pac. 1100; 35 Cyc. 169. The correspondence set out in the complaint, which must be taken to consist of all that took place between the parties, fails to show any refusal on the part of the respondent to accept the hay, and the complaint is silent as to any offer on the part of the appellant to perform the contract by an actual tender, the last expression from it being that it would appreciate the taking of delivery by the respondent.

Judgment affirmed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 16031. Department Two. January 14, 1921.]

THE STATE OF WASHINGTON, *Respondent* v. BENNY JONES, *Appellant*.[1]

INTOXICATING LIQUORS (30) — OFFENSES — ILLEGAL POSSESSION — ELEMENTS OF OFFENSE. One who partakes of a friend's hospitality by accepting and drinking a glass of liquor is not guilty of "illegal possession," in view of Laws 1917, p. 61, § 12, providing that a layman's possession of intoxicating liquor other than alcohol shall be prima facie evidence that the liquor was kept for the purpose of unlawful sale or disposition, and Id., p. 60, § 11, making such possession unlawful and defining "jointist" and "bootlegger," it being the intention that "possession" should be of such quantities or under such conditions as would make it available for unlawful transportation or sale.

Appeal from the judgment of the superior court for Snohomish county, Alston, J., entered March 30, 1920, upon a trial and conviction of the unlawful possession of intoxicating liquor. Reversed.

E. C. Dailey and *A. E. Dailey*, for appellant.

Thos. A. Stiger and *Q. A. Kaune*, for respondent.

TOLMAN, J.—Appellant was convicted of the crime of having in his possession intoxicating liquor other than alcohol, and sentenced to imprisonment in the county jail for a period of thirty days. Bringing the case here on appeal, he seeks a reversal because of certain instructions given to the jury by the trial court.

The case was submitted to the jury shortly after 2 o'clock p. m. of the day of trial, and not having reached a verdict at 9:50 a. m. of the following day, by direction of the trial judge, the jury was brought into open court and the record shows the following proceedings:

[1]Reported in 194 Pac. 585.

"The Court: Ladies and gentlemen of the jury, have you been able to agree upon a verdict?

"The Foreman: We have not.

"The Court: Do you think there is any probability of agreeing?

"Responses: I do not. It don't look that way to me. No, sir.

"The Court: Is there any question in your mind about the law in the case?

"The Foreman: I don't know whether there is a question—There are two in the minority. I don't know what is in their minds. A reasonable doubt, I suppose, and the correctness of the other ten.

"Mr. Kaune: If the court please, I move at this time that the jury be further, and a little more elaborately instructed upon the question of what constitutes a sufficient possession to find the defendant guilty in this case; that is to say, what possession would be sufficient for them to find a defendant guilty upon a charge of this character.

"The Foreman: I think that would be a good thing.

"The Court: Ladies and gentlemen of the jury, there is just one question in this case for you to decide. You have nothing to do with the penalty that may be imposed. The legislature of the state makes the law and it is up to the rest of us to determine whether or not that law shall be enforced. Now, you are instructed, as a matter of law, if you believe beyond a reasonable doubt that anybody brought to the home of this defendant a bottle of whiskey and that the defendant, in company with the remainder of those present, sat down and drank that whiskey—took a glass of whiskey and drank it—he was guilty of a violation of this law and it is your duty to find him guilty. If you do not believe that he took a glass of whiskey in his hand and drank it, then I say that you should find him not guilty.

"The word 'possession' has a well-defined meaning, and it is this: I have in my possession a spectacle case; if I pick up a glass containing whiskey I have

in my possession whiskey. That is all there is to this case. The jury may retire.

"Mr. Dailey: Just a minute, Your Honor. The defendant asks that the court instruct the jury that possession constitutes the control of as well as ownership as contemplated in the law.

"The Court: I will instruct you that if the defendant had in his possession a glass of whiskey with power to drink it and he did drink it, that he had absolute possession of it and is guilty of a violation of this law.

"Mr. Dailey: Give me an exception.

"The Court: Yes, sir, I will grant you an exception. [The jury retires.]

"Mr. Dailey: We take an exception to the instruction of the court and to his instructing the jury orally at the request of the prosecuting attorney without any request from the jury for further instruction."

Within a few minutes after receiving this additional instruction, the jury returned a verdict of "guilty as charged."

Passing the statement by the court to the effect that the legislature makes the law and that it is the duty of the rest of us to determine whether or not that law shall be enforced, because the court's attention was not called to its impropriety by a proper objection, still we cannot agree with the construction given to the statute by these instructions. The whole purpose of Initiative Measure No. 3, and Laws of 1917, p. 46, ch. 19, amendatory thereof, is to forbid the manufacture, transportation and sale of intoxicating liquors, and a careful consideration of both measures fails to reveal any attempt upon the part of the law-making body to make it unlawful to purchase or drink such liquor. Section 11 of the act of 1917, p. 60, adds a new section to the original act to be known as "Section 17h," which reads:

"It shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actual-

ly engaged in ministering to a religious congregation, to receive from any common carrier or person engaged in the business of transporting goods, wares and merchandise, any intoxicating liquor other than alcohol and it shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor other than alcohol.

"Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, be and hereby is defined to be a 'jointist.' Any person who carries about with him intoxicating liquor for the purpose of unlawful sale of the same be and hereby is defined to be a 'bootlegger.' Any person convicted of being either a 'jointist' or 'bootlegger' as herein defined shall be deemed guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

"A violation of any of the provisions of this section shall constitute a separate, substantive offense irrespective of any other provisions of this act."

And § 12 of the amendatory act immediately following the section just quoted, amends § 23 of the original act, to read:

"In any prosecution for the violation of any provision of this act, it shall be competent to prove that any person, other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, had in his possession any intoxicating liquor other than alcohol, and such possession and proof thereof shall be *prima facie* evidence that said liquor was so held and kept for the purposes of unlawful sale or disposition." (Laws of 1917, p. 61, § 12.)

Taking these two sections together, in the absence of anything else upon the subject of the mere possession alone, leads to the conclusion that the legislature had in mind only the possession of liquor in such quan-

tities and under such conditions as would make it available for unlawful transportation or sale, and did not intend to make a criminal of every person who might partake of a friend's hospitality. Moreover, since the state here stands upon a technical construction of the word "possession," we may say that possession, as the word is used in the statute, means something more than the mere taking in the hand for the purpose of immediately drinking the thing thus possessed upon the express invitation of the owner so to do.

Appellant's counsel suggested the correct idea in his objection, and the court should at least have defined possession as including control of the thing possessed with the right to dispose of it in any manner the possessor saw fit. As we understand the laws of hospitality, when one is offered a glass of liquor, he has a right to accept and drink it or refuse it, and his possession, if he accepts it, is not broader than the invitation upon which he acts.

The judgment of the trial court is reversed.

HOLCOMB, MOUNT, and MITCHELL, JJ., concur.

[No. 16003. Department One. January 18, 1921.]

MARK LITCHMAN *et al., Appellants,* v. PACIFIC TELEPHONE AND TELEGRAPH COMPANY, *Respondent.*[1]

TELEGRAPHS AND TELEPHONES (14)—DAMAGES (19)—MENTAL SUFFERING. Compensatory damages for mental anguish cannot be recovered by a telephone subscriber who changed his residence and was required to take a new number, and was humiliated and annoyed by unintentional negligence on the part of operators in reporting his old number as "temporarily disconnected," where there was no evidence of any physical or financial injury or loss.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 9, 1920, in favor of the defendant, notwithstanding the verdict of a jury for plaintiff, in an action in tort, after a trial on the merits. Affirmed.

Mark M. Litchman and *Thos. R. Horner,* for appellants.

Chadwick, McMicken, Ramsey & Rupp and *John P. Garvin,* for respondent.

HOLCOMB, J.—Two causes of action to recover damages: (1) for telephone service alleged to have been paid for and not rendered; and (2) for bad telephone service and inconvenience, annoyance and discomfort, during a period of four months from approximately June 15, 1918, to about the latter part of October, 1918, were sued on in this case.

The case was tried to the court and a jury. The jury returned a verdict of five dollars for the plaintiffs on account of telephone service paid for and not rendered, and seven hundred dollars for discomfort, annoyance, inconvenience and humiliation alleged to

[1]Reported in 194 Pac. 967.

have been suffered by the plaintiffs as a result of intentional bad service and false statements of the defendant telephone company's employees. From a judgment for the defendant notwithstanding the verdict on the second cause of action, the plaintiffs appealed.

The appellant Mark M. Litchman is an attorney, and his wife is a nurse. On June 15, 1918, they moved from 4611, Second avenue, northeast, Seattle, where they had been living, to 3637, 34th avenue, south. In the former residence, the number of the appellants' telephone had been North 532; and when they moved, they requested the telephone company to permit them to retain the same telephone number at their new residence. The company informed the appellants that this would be impossible, inasmuch as the new residence was in a different exchange district. However, the parties who vacated the house into which the appellants moved had a telephone there under the number, Rainier 230-W, and the appellants were accommodated by the telephone company by being allowed to keep this same telephone and number. The instrument in the residence from which the appellants had moved was thereupon disconnected. The exchange operators for the exchange district in which telephone North 532 was had the number marked as "temporarily disconnected." Accordingly, when persons, who desired to communicate with the Litchmans, but did not know of their removal and of their new telephone number, attempted to get in communication with the Litchmans by calling their old number, the exchange operator would give such persons the formal answer that telephone North 532 was "temporarily disconnected."

Appellants assert that the phrase "temporarily disconnected" signified that they were in arrears in the

payment of their telephone rental, and, that fact being so reported to clients, patients and friends of theirs, was very humiliating, annoying and discomforting. They claimed nothing at the trial on account of losing business or financial loss, but claimed only that they were entitled to substantial damages although incapable of mathematical computation.

In the actions of the telephone company and its officers and employees, there was not the slightest element of malice, ill will or wilfulness. On the contrary, they seemed desirous of in every way accommodating appellants, who removed their residence through no fault of respondent. Under respondent's general rule and customs, appellants could have been kept on the waiting list for a new listing. To have retained their old telephone number in a different exchange district was impossible.

The undisputed evidence of the telephone company was that the term "temporarily disconnected" was used by the operators under its operating system under four conditions: (1) When alterations were being made at the subscriber's premises; (2) when the subscriber was absent for a vacation or trip and wished to retain his telephone but not to use it for that period, and so was given a vacation rate for such period, during which the report of operators to telephone callers would be "temporarily disconnected," although the telephone rental had been paid in advance; (3) when there was a change of location, or outside move, as it was called by the company, during the period that the telephone was out of service; and (4) on non-payment of bills. The number of telephones that were designated "temporarily disconnected" for the first three causes equaled or exceeded the number so designated for non-payment of bills. At no time and in no instance, were the Litchmans reported "temporarily dis-

connected" for non-payment of telephone rental. The operators did not know why the telephone numbered North 532 was designated "temporarily disconnected." When Mr. Litchman complained to the manager of the company of the remarks and complaints of the clients, patients and friends of himself and his wife, that official at once directed the transfer of incoming calls from the old number to the new. These facts show that there was simple and unintentional negligence on the part of operators and employees of the company, nothing more.

There are cases holding that, for wilful injury, gross and wanton negligence, or deliberate omission of duty toward the telephone users, damages may be allowed for inconvenience, discomfort and annoyance, without other substantial loss. But in nearly all the cited cases, there was other substantial pecuniary loss, and the injury was purposely and knowingly caused, or where exemplary damages were permitted, as in *Sommerville v. Chesapeake & Potomac Tel. Co.*, 258 Fed. 147, and *Cumberland Tel. & Tel. Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. 702. In *Carmichael v. Southern Bell Tel. & Tel. Co.*, 157 N. C. 21, 72 S. E. 619, Ann. Cas. 1913 B 1117, 39 L. R. A. (N. S.) 651, the company wrongfully disconnected the subscriber's telephone. In *Harbaugh v. Citizens' Tel. Co.*, 190 Mich. 421, 157 N. W. 32, Ann. Cas. 1918 E 117, the removal of the telephone was found by the court to be unwarranted according to the terms of the contract between the subscriber and the company.

The elements of injury here relied upon, without any physical or financial injury or loss, are not more serious than mental anguish, which, without physical injury or pecuniary loss, we have always rejected as a sole element of damages. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883;

Corcoran v. Postal Tel-Cable Co., 80 Wash. 570, 142 Pac. 29, L. R. A. 1915 B 522; *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172. See, also, *Western Union Tel. Co. v. Ferguson*, 26 Ind. App. 213, 59 N. E. 416; *Cumberland Tel. & Tel. Co. v. Hendon*, 114 Ky. 501, 71 S. W. 435, 102 Am. St. 290, 60 L. R. A. 849; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. 183, 17 L. R. A. 430.

Judgment affirmed.

PARKER, C. J., MACKINTOSH, BRIDGES, and FULLERTON, JJ., concur.

[No. 16037. Department Two. January 18, 1921.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v. THE CITY OF WALLA WALLA, *Appellant*.[1]

MUNICIPAL CORPORATIONS (225)—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICT—"BLOCK." For the purposes of a special assessment upon city blocks abutting upon the street, a fifteen-foot alley 120 feet from the street, not designated upon the plat as either a street or an alley, must be considered as a street and not as an alley bisecting a block, leaving only the abutting block liable to assessment as required by Rem. Code, § 7892-13.

SAME (258)—PUBLIC IMPROVEMENTS—ASSESSMENTS — FAILURE TO MAKE OBJECTION. When property is included in an assessment roll which is not subject to assessment, the proceedings are void and may be attacked in any manner although no objection was made to the confirmation of the roll.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered May 22, 1920, upon findings in favor of plaintiff, in an action to recover money paid under protest for special assessments. Affirmed.

[1]Reported in 194 Pac. 962.

H. B. Noland, for appellant.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and *John H. Pedigo,* for respondent.

TOLMAN, J.—The respondent as plaintiff brought this action to recover the sum of $152.68, paid by it under protest to discharge a special assessment against a portion of its right of way, imposed by the city of Walla Walla for the improving of Valencia street, in that city. The ground of objection to the assessment, and the only attack upon the regularity and sufficiency of the proceedings leading up to such assessment, is stated in the complaint, as follows:

"That the property so assessed lies outside of and beyond a distance of 120 feet from the streets so to be improved and that the city commission of the city of Walla Walla, had no jurisdiction or authority to pass said ordinance or assess plaintiff's right of way for and on account of the cost of said improvement in that blocks 5, 6, and 7, contained within said improvement district are 120 feet in depth and the said city could not lawfully extend said district to a greater depth than 90 feet from the marginal line of the street or other places to be improved and had said district been confined within said limits it would not have included any part of plaintiff's right of way hereinbefore described."

The trial court made findings of fact supporting the allegations of the complaint, and entered judgment against the city for the amount prayed for, from which judgment the city appeals.

It appears that blocks 5, 6 and 7, of Green's Park Addition, fronting on the street to be improved, are each platted as a distinct block one hundred and twenty feet deep, to a fifteen-foot street or alley, and that respondent's right of way joins and abuts on this alley on the westerly or opposite side; or, in other words,

the right of way is wholly outside of these blocks as platted, and separated from them by a public street or alley fifteen feet wide. Blocks 2, 3, and 4, of Green's Park Addition, also platted as separate and distinct blocks, lie westerly of the right of way, extending therefrom something like one hundred and fifty feet to Bonnie Brae street, and the city, in fixing the assessment district, has treated block 7 and block 2 as if both taken together constituted one block, bisected by an alley and the right of way; likewise it has treated blocks 5 and 6, lying east of the alley and right of way, as though blocks 4 and 3, lying to the west of the right of way, were included as a part of each respectively.

We are now urged to accept the present view of the city that, instead of six blocks as platted, they be considered as three blocks with the alley and right of way passing through them. While it may be, as contended, that a block usually consists of a parcel of land surrounded by three or more streets, yet, even so, the so-called alley may be a street in fact, though but fifteen feet in width. It is designated on the plat neither as a street nor as an alley, and we think must be treated as a street in this case, if a street in that location be necessary to the holding that each of these blocks described are separate and distinct blocks; because the plat and dedication of Green's Park is in evidence and upon it appears the following endorsement:

"I hereby certify that this plat and the survey of Green's Park Addition to the city of Walla Walla conforms to the requirements of Ordinance No. 546 regarding additions to the city of Walla Walla, Wash.

"E. S. Clark, City Surveyor.

"Approved by the council of the city of Walla Walla July 21st, 1903. E. S. Clark, City Surveyor."

Having approved the plat, the city is bound thereby and may not now refuse to recognize as a block what

the plat so designates. If, then, the blocks be as shown upon the plat, the trial court correctly applied the statute, Rem. Code, § 7892-13.

It is earnestly contended that, in any event, the failure of respondent to object in a timely manner to the assessment roll is fatal to its cause of action; but the rule is established in this state that, when property is included which is not subject to the assessment, the proceedings are void and the property owner is not required to object to the confirmation of the assessment roll, but may rest on his rights and resist the assessment at any time and in any form. *Seattle & Puget Sound P. Co. v. Seattle,* 51 Wash. 49, 97 Pac. 1093.

The judgment of the trial court is affirmed.

MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15989. Department Two. January 19, 1921.]

GUARANTY SECURITY COMPANY, *Respondent,* v. R. J. COAD, *Defendant,* B. B. HORRIGAN, *Garnishee, Appellant.*[1]

ACTION (26) — CONSOLIDATION — GARNISHMENTS. Two garnishment proceedings are properly consolidated where they both had for their purpose the impounding of certain promissory notes and their proceeds, belonging to the judgment debtor or his alleged transferee, and the effect of the consolidation was to protect the maker of the notes against double liability thereon.

LIMITATION OF ACTIONS (82)—AVAILABILITY—PERSONAL NATURE OF DEFENSE. The statute of limitations is a defense personal to the debtor, and does not prevent a voluntary payment of the debt by the transfer of promissory notes by a failing debtor.

FRAUDULENT CONVEYANCES (92, 97)—PREFERENCE OF RELATIVES—PAYMENT OF DEBT — EVIDENCE — SUFFICIENCY. A preference of a brother-in-law by the transfer of notes in payment of an outlawed debt, is not shown to be fraudulent as to a judgment creditor, who

[1]Reported in 195 Pac. 22; 197 Pac. 326.

had instituted garnishment to impound the notes, where it is undisputed that the notes were sent and received in payment of the debt, and the assignee had no knowledge of the judgment or garnishment proceedings.

BILLS AND NOTES (64, 69)—BONA FIDE PURCHASERS—ACTUAL NOTICE—PRE-EXISTING DEBT. A debtor, taking promissory notes in payment of the debt, without notice of an infirmity, is a *bona fide* holder for value, within Rem. Code, § 3447, defining notice of an infirmity, and Id., § 3416, providing that an antecedent or pre-existing debt constitutes value.

SAME (68)—BONA FIDE PURCHASERS—TAKING AS COLLATERAL SECURITY. The transfer of notes to a creditor for the purpose of collecting what he could and applying it on an antecedent debt constitutes a holding as collateral, within Rem. Code, §§ 3417, 3418.

ON REHEARING.

SAME (64, 69). A debtor taking promissory notes in payment is not a *bona fide* holder where the notes were past due and subject to the lien of a garnishment.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 28, 1920, upon findings in favor of plaintiff, in consolidated garnishment proceedings involving the title to promissory notes. Reversed.

C. M. O'Brien, for appellant.

Davis & Heil, for respondent.

HOLCOMB, J.—Respondent, having a judgment in the superior court of Spokane county for $420, with legal interest from date of judgment, February 19, 1919, sued out a writ of garnishment, on October 23, 1919, against, and had the same served upon, appellant, on the next day. Appellant answered in due time, denying any indebtedness to defendant, admitting that he had in his possession promissory notes signed by Charles Frazier, payable to the order of R. J. Coad; and alleged that he held the notes as the property of one Charles Babbitt. Respondent controverted this

answer, denied that the notes belonged to Babbitt, and alleged that they belonged to defendant Coad.

A prior writ of garnishment had issued and been served against Charles Frazier, on March 5, 1919. That garnishee defendant answered in due time, admitting the execution of seventeen promissory notes to defendant Coad, the first of which fell due February 13, 1919, and one on the same day of each month thereafter, each bearing interest at the rate of seven per cent per annum. He also alleged that Coad had left the state of Washington, and was, as he believed, at the time residing in Colorado, and had the notes in his possession, or had transferred the same.

This answer was controverted and, upon the issues framed, a hearing was had in the superior court on September 22, 1919, but not concluded, the hearing having been continued by order of the judge in order to get further evidence to discover who then owned the notes so that the maker of the notes might not have to pay them twice. The deposition of defendant Coad had been taken in this prior proceeding, wherein he testified that, about May of that year, he had transferred and indorsed the notes to Charles Babbitt, of Milwaukee, Wisconsin, in payment of a pre-existing indebtedness of approximately $500, incurred in 1911 or 1912, for money loaned him by Babbitt, and interest; that no additional sum was paid him by Babbitt at or about the time of the transfer; that he knew, at the time of the transfer, that a judgment had been obtained by respondent in Spokane county, Washington; that he was informed by letter from Frazier, about June or July, 1919, of the garnishment against Frazier; that he never informed Babbitt of the judgment, nor of the Frazier garnishment; that he transferred the notes to Babbitt to pay his long-existing debt to him, and considered it paid; that he was in

Denver, Colorado, and Babbitt in Milwaukee, Wisconsin, when the transfer was made by correspondence by mail. The deposition of Babbitt was then also taken in the Frazier matter, in Milwaukee, Wisconsin. Babbitt testified that he was a brother-in-law of defendant Coad; that Coad sent him, by mail, notes aggregating $550, indorsed by Coad unrestrictedly, in the fore part of July, 1919; that, on October 2, 1919, he received, by mail, a second batch of notes, aggregating $150, from Coad, indorsed, unrestricted, by Coad; that Coad owed him $500 for money loaned him in 1912 and for living expenses of Coad and wife, and interest, upon open account; that he received no notice of any judgment against Coad, or of any garnishment against the notes; that he received the notes in payment of his account and interest; that Coad owed him nothing; that he intended to write Coad that he (Babbitt) had received the notes in settlement of Coad's indebtedness; that he had had no previous arrangement with Coad for the transfer and acceptance of the Frazier notes in settlement of Coad's indebtedness; that he had mentioned Coad's indebtedness to him about three years before, when Coad had visited him, and Coad had then promised to pay or settle part or all of the debt as soon as he could; that he (Babbitt) had sent each batch of notes to appellant, an attorney of Pasco, Washington, who had been attending to some property in Pasco for several years for Babbitt, but whom he did not personally know, within two or three days after the receipt thereof each time, for collection for him (Babbitt).

No other evidence was taken at the hearing of the garnishment proceeding against appellant, except the evidence of Frazier and the deposition of Babbitt taken in the Frazier hearing. There was no evidence controverting the testimony of any of those witnesses.

Appellant, contending that the two garnishment proceedings were entirely independent of each other, and that he is not to be bound by testimony taken in any other proceeding than the proceeding against himself, urged as error the admitting in evidence in the trial of these proceedings the testimony of Charles Frazier, taken in the former garnishment proceeding, and the deposition of Coad.

The court, however, consolidated the two proceedings and gave permission to appellant to intervene on behalf of Babbitt, if he desired, but Babbitt did not desire to do so. However, the interests of justice were best subserved by consolidating the two proceedings. The object of both was, of course, to impound the notes, or the proceeds thereof, for application to the judgment of respondent against Coad. In the interests of justice, Frazier should have been protected, and was protected, by the court against double liability on the notes. The question properly to be determined was, Who, at the time of the second garnishment, was the legal owner of the notes in question? And that could not be determined without taking the testimony of those having primary knowledge of all transactions relating to the notes. It was a matter of discretion, therefore, for the court to consolidate the two garnishment proceedings, continue the first one, and consider all the testimony in the last one; and of this appellant has nothing to complain.

The decisive question in this case is, as appellant states it, Were the notes in the hands of appellant, at the time the writ of garnishment was served upon him October 24, 1919, the property of Coad or Babbitt?

The trial court found that, at the time of the transfer of the notes from Coad to Babbitt, Coad was indebted to Babbitt for over $500, besides several years' inter-

est. Indeed, he could find nothing else; for there was no testimony in any way controverting. Coad testified that the notes were transferred to Babbitt in payment of his indebtedness to Babbitt; and Babbitt testified that he took the notes from Coad in payment of his indebtedness, and sent them to his attorney, the appellant, for collection. It is true that Coad's debt to Babbitt existed only upon open account, and that it apparently could have been successfully defended against by reason of the statute of limitations. But the statute of limitations can only be invoked by the debtor himself. The debt, nevertheless, exists, and there is a moral obligation to pay it. For the sake of public policy, debtors are permitted by statutes of limitation, after the lapse of a certain time, to plead the statute as a bar to the collection of the ancient debt. But no one else can invoke it but the debtor; and if the debtor desires to prefer a creditor, he has, under the unbroken decisions of this state, the right to do so; and he may prefer a creditor whose debt might be barred by the statute of limitations, if plead, and does so in good faith.

Now, it is true that Babbitt is a brother-in-law of Coad's; that the debt from Coad to Babbitt upon open account was seven years old at the time of the transfer; that Coad himself knew that there was a judgment in Spokane county against him for $420 and interest; and that a writ of garnishment had been issued out of the superior court of Spokane county against Frazier, the maker of the notes, seeking to impound the notes, or the proceeds thereof. But there is no dispute on the fact that, when Coad transferred the notes to Babbitt, he did not inform Babbitt of the existence of any judgment against Coad, or of any

writ of garnishment against the notes; and Babbitt took the notes without any such knowledge, or notice which would put him upon inquiry.

The trial court, in deciding the case, said that he would,

". . . have grave doubts whether the assignment of these notes by Mr. Coad to Mr. Babbitt was a *bona fide* transaction. In the first place, the original indebtedness was not insisted upon by Mr. Babbitt. He said that he did not ask Mr. Coad to pay it, running on from year to year, the relation of brother-in-law, in fact, existed between them, there was never a note taken, never a memorandum required, never a written account made of the advances made from time to time. Under the circumstances it might almost be regarded as a gift by Mr. Babbitt to Mr. Coad. Yet even assuming that there was an indebtedness originally from Coad to Babbitt, it seems to me that the assignment of these notes, or rather the surrender of these notes by Coad to Babbitt was such that they could not be considered as an assignment of the notes, but that they were merely handed over to Babbitt—I think so far as Coad is concerned undoubtedly for the purpose of avoiding this garnishment—so far as Babbitt is concerned that he might get out of them what he could. There was no previous correspondence between them at all. Babbitt did not look into the solvency of the maker, did not see whether the notes were worth anything or not, simply took them, ..."

The trial court further suggested that, where there is a series of notes, such as existed here, a party who takes some of them overdue would take the rest of them with notice of the defect that exists with reference to all of them.

It requires more than mere doubt to set aside a transfer by one to another—even though a relative—as a transaction in bad faith. In *National Surety Co. v. Udd,* 65 Wash. 471, 118 Pac. 347, involving an al-

leged fraudulent transfer by a deed to a relative (cousin), we held the evidence to be insufficient to warrant the setting aside of a deed as fraudulent as to creditors, although the grantor was converting his real property into money with fraudulent intent to avoid payment of a judgment in a pending suit, where it appeared that the grantee, a cousin of the grantor, was also a creditor and took the conveyance in discharge of an antecedent indebtedness, and it was not shown that he had such notice of the pending suit, or so participated in the grantor's fraud as to cause him to lose the preference, the burden of proof to establish such notice being upon the plaintiff. And in that case we pointed out that there were many circumstances tending to cast suspicion upon the transaction, but that they were not sufficient to show bad faith on the part of the grantee.

Coad, the payee of the notes, had departed from this state, was residing in another state, and had taken the notes with him at the time of the attempted impounding of the notes or the proceeds thereof by the writ of garnishment on Frazier. It is true that, after notice of the garnishment against Frazier, Coad was in another state, transferred and indorsed the notes to his relative, Babbitt, and delivered them to him, without any notice or information to him that there had been a garnishment issued against the maker of the notes.

Section 3447, Rem. Code, provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Section 3416, Rem. Code, provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; . . ."

With these sections of the statute in view, and it being indisputably established that Babbitt received the notes without any notice of infirmity in them or defect in the title of Coad, or knowledge of such facts that his action in taking them amounted to bad faith, and the statute that an antecedent or pre-existing debt constitutes value, there can be no question but that Babbitt became, before the writ of garnishment against appellant, a *bona fide* holder for value, without notice, of the notes.

As was held in *Citizens' Bank & Trust Co. v. Limpright,* 93 Wash. 361, 160 Pac. 1046:

"There can be no imputation of bad faith from the fact of taking negotiable paper, fair on its face, without active inquiry, nor by mere speculation as to diligence or negligence, and evidence going no further, and showing no actual notice, is insufficient to sustain findings that plaintiff was not a *bona fide* purchaser for value." (Syllabus)

And, again, in *National City Bank v. Shelton Elec. Co.,* 96 Wash. 74, 164 Pac. 933, we held:

"Under Rem. Code, § 3447, providing that to constitute notice of a defect in the title of the person negotiating a promissory note, the person to whom it is negotiated must have actual knowledge of the defect, the rights of the holder are to be determined by the simple test of honesty and good faith, and it is not enough that the holder was negligent or omitted precautions dictated by prudence." (Syllabus)

To the same effect, see *Gray v. Boyle,* 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042; and *Scandinavian-American Bank v. Johnston,* 63 Wash. 187, 115 Pac. 102.

Even though, as the trial court suggested, the notes were accepted by Babbitt, not in settlement and satisfaction of his debt, but for the purpose of collecting what he could and applying the same to his debt, that would constitute a holding as collateral; and in that case, in *German American Bank v. Wright,* 85 Wash. 460, 148 Pac. 769, Ann. Cas. 1917D 381, we held that, under the statutes heretofore quoted, and other statutes, as follows:

"§ 3417. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time;

"§ 3418. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien;"

such holder would be entitled to protection to the extent of the amount of his debt against the payee and transferrer of the negotiable instrument. See, also, cases there cited.

We are therefore obliged to conclude that, under the statutes and the adjudicated cases, the trial court erroneously found and concluded that Babbitt was a holder not in good faith, for value; and the judgment must be reversed. It is so ordered.

MOUNT, MITCHELL, and TOLMAN, JJ., concur.

ON REHEARING.

[Department Two. April 5, 1921.]

PER CURIAM.—On petition for rehearing filed by respondent in this case, issue was taken with the determination in the decision made herein, that the five notes aggregating $125, which were transferred to

Babbitt after their maturity, made Babbitt a *bona fide* holder for value, without notice; insisting that Babbitt could not have been a *bona fide* holder in view of the fact that they were all transferred subsequently to the date of service of the writ of garnishment upon Frazier, the maker of the notes. Respondent demands that a rehearing be granted or the judgment modified as to the five notes transferred as being due at the time of their transfer to Babbitt.

Answering the petition for rehearing or for modification, appellant says that he has always been willing to concede, and does concede, that whatever rights respondent acquired by his writ of garnishment against Frazier would not reach the past due notes for $125. Appellant offers that the decision herein filed January 19, 1921, be modified as follows:

After the clause reading, "There can be no question but that Babbitt became, before the writ of garnishment against appellant, a *bona fide* holder for value, without notice, of the notes," adding thereto the following clause: "except as to the $125 of past due notes, of which he became the owner subject to the lien of the writ of garnishment."

This modification is adopted by the court, and the opinion will be modified accordingly, so as to read as follows:

"With these sections of the statute in view, and it being indisputably established that Babbitt received the notes without any notice of infirmity in them or defect in the title of Coad, or knowledge of such facts that his action in taking them amounted to bad faith, and the statute that an antecedent or pre-existing debt constitutes value, there can be no question but that Babbitt became, before the writ of garnishment against appellant, a *bona fide* holder for value, without notice, of the notes, except as to the $125 of past due notes of

which he became the owner subject to the lien of the writ of garnishment against Frazier."

In all other respects, the petition for rehearing is denied.

[No. 15892. Department Two. January 19, 1921.]

HITT FIREWORKS COMPANY, *Appellant*, v. SCANDINAVIAN AMERICAN BANK, *Respondent*.[1]

BANKS AND BANKING (26)—GENERAL OR SPECIAL DEPOSITS—EVIDENCE AS TO PURPOSE—SUFFICIENCY. There was a special and not a general deposit, rendering the bank liable as a trustee and preventing the bank from charging the account, where plaintiff, a fireworks company, had a lien on gate receipts received at evening performances given by an exposition company, between whom it was agreed and understood that the money was to be held in a separate fund to be applied on the contract of plaintiff, who was offered the money late at night, and who, owing to the lateness of the hour, accepted a check instead on the assurance that the check would be good, made by the treasurer of the exposition, who was also the cashier of the bank, and the money was placed by him, or others by his direction, on the floor of the vault, where it remained over the holidays.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 5, 1920, dismissing an action to recover a special deposit, after a trial on the merits to the court. Reversed.

Ellis & Evans, for appellant.

Williamson, Williamson & Freeman (*T. L. Stiles*, of counsel), for respondent.

MAIN, J.—This is an action brought by the Hitt Fireworks Company, as plaintiff, against the Scandinavian American Bank of Tacoma, for damages. After the issues were framed, the cause in due time came on

[1]Reported in 195 Pac. 13; 196 Pac. 629.

for trial before the court sitting without a jury. At the conclusion of the plaintiff's evidence, a motion was made by the defendant to dismiss the action because it was claimed that a case had not been made out. This motion was sustained and a judgment of dismissal entered. The plaintiff appeals. The facts may be summarized as follows:

The Hitt Fireworks Company is a corporation organized and existing under the laws of the state of Washington. The Scandinavian American Bank is a corporation organized under the laws of this state and is conducting a banking business in the city of Tacoma. The Northwest Peace Jubilee Company was a corporation organized for the purpose of putting on a jubilee celebration in the city of Tacoma from June 30 to July 6, 1919. The jubilee grounds included the Tacoma Stadium and certain grounds adjacent thereto. On June 20, 1919, the Peace Jubilee Company entered into a written contract with the Hitt Fireworks Company whereby the latter was to furnish a special fireworks display which was to be in the Stadium. This contract, among other things, provided that there should be paid to the Hitt Fireworks Company, out of the first proceeds by the Jubilee Company from the sources of revenue to the exclusion of all other obligations, the amount which was due the fireworks company.

On July 2, the fireworks company had not put on any part of its program. The president of the company, not being satisfied with the contract, refused to proceed until he was given further assurance that the money which would be due him under the contract would be paid if the show was put on as contemplated. M. M. Ogden was treasurer of the Peace Jubilee Company and also cashier of the Scandinavian American Bank. On the afternoon of the day mentioned, the executive committee of the Peace Jubilee Company

had a meeting at which Mr. Ogden and others were present, and entered into negotiations with the president of the Hitt Fireworks Company looking to the adjustment of the question which had arisen. The result was that a resolution was passed which provided:

"The Hitt Fireworks Company will have a lien on all moneys received at the gate which goes directly into the Stadium from the street, and a further lien of twenty-five cents per capita for all persons passing from the Jubilee grounds into the Stadium on the nights of July 2nd, 3rd and 4th; it was also understood by all parties that the Northwest Peace Jubilee . . ."

The resolution further recited:

"It was understood that Mr. Hitt would be allowed to check the receipts from the gates leading direct into the Stadium as well as the number of tickets representing the people passing from the Jubilee grounds into the Stadium and that amount received at the gate leading from the street direct into the Stadium plus twenty-five cents per capita for every person passing from the Jubilee grounds into the Stadium shall be held in a separate fund by the treasurer, M. M. Ogden, to be applied on the total amount of the contract between the Northwest Peace Jubilee and Hitt Fireworks Company."

Mr. Hitt was the president of the Hitt Fireworks Company. After this resolution was passed and on the evening of July 2, the fireworks company put on its performance in the Stadium; likewise, on the third and fourth. On the evening of the third, at about twelve o'clock, after the show was over, the president of the fireworks company went to the office of Mr. Ogden, treasurer of the Peace Jubilee Company, and the receipts were there assembled on a desk or table. At this meeting Mr. Ogden said to Mr. Hitt, in effect,

"Here's your money, how will you have it?" To which Mr. Hitt replied, "It is very late for me to take that amount of money in my personal supervision at this time of night," and a check was tendered, which Mr. Hitt testified he accepted provided it was good, and he was assured by Mr. Ogden that the check would be good when presented. The testimony of Mr. Hitt as to what occurred on the night of the third is as follows:

"A. On the night of the 3rd I went into the treasurer's office, Mr. Ogden was there, and the money or the receipts were laying there on the desk and the crowd was double the night of the 2nd, we were both feeling pretty good. He said, 'Here is your money, how will you have it?' I said, 'It is very late for me to take that sum of money in my personal supervision, at that time of night,' and he tendered me a check. I said I would accept the check provided it was good. That is substantially, your Honor, the conversation that took place on the night of the 3rd.

"Q. Did he say whether the check would be good in that conversation—the night of the 3rd is what I am asking about? A. Yes, he said it would be good, it was good. Q. After that you accepted these two checks? A. I did. Q. He had the money there, the cash? A. He did. Q. To refresh your memory was anything said in that conversation about banking the money at all? A. He stated that the check would be good or that the check was good, and some further conversation was made about taking the money to the bank, and relying on the statement or rather the committee meeting that had been had, I took his word for the fact that the money would be good, that the checks would be good when presented."

The account of the Peace Jubilee Company was kept in the Scandinavian American Bank, of which Mr. Ogden was cashier. On the night of the third, two checks were given for three thousand dollars each; the money was taken by Mr. Ogden and placed upon the floor of the vault in the bank. On the night of July

4, substantially the same thing occurred. Mr. Hitt went to the office of Mr. Ogden, the treasurer of the Peace Jubilee Company, and at that time it was thought that the receipts had been abundant to take care of all expenses, since the attendance had been large. The money for that performance was there and as testified by Mr. Hitt:

"The same proposition occurred—it was impossible for me to take the funds or inadvisable for me to take funds in actual cash, so they offered me a check which I accepted."

On this night, a check was given Mr. Hitt for the fireworks company for $8,100. The money was taken by Mr. Ogden and placed on the floor of the vault in the bank. On the morning of the fifth, Mr. Hitt went to the bank for the purpose of getting his checks cashed and was advised that, that being a holiday, they could not be then paid; this was on Saturday the fifth. On Sunday, the sixth, a number of persons interested in the show had a meeting at which was present the attorney for the bank and Mr. Ogden. At this time it was decided to have one of the creditors garnishee the bank. On the morning of the seventh, which was Monday morning, Mr. Ogden caused the money which had been placed upon the floor of the vault to be entered upon the books of the bank in the general account of the Peace Jubilee Company. The Jubilee Company had an overdraft at the bank of something like eleven thousand dollars, which then was charged against the account. Mr. Hitt presented his checks, the two three thousand dollar checks being paid and the payment of the eight thousand dollar check refused because there were not sufficient funds to cover it. Thereafter, this action was brought against the bank, claiming that, as against the Hitt Fireworks Company, the bank had no right to charge off the over-

draft of the Peace Jubilee Company against its account.

The first question to be determined is whether the deposit in the bank made on Monday morning was a special or a general deposit. The general rule is that, when money is deposited, title passes to the bank and it becomes the debtor of the depositor to the extent of the deposit. But this rule is subject to exceptions, one of which is that where money is deposited to be used for a particularly designated purpose, the deposit is special and title does not pass to the bank. *Kies v. Wilkinson,* 101 Wash. 340, 172 Pac. 351. When the deposit is special, the bank becomes a trustee and holds the money in a fiduciary capacity. *Carlson v. Kies,* 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317. If the deposit was special and not general, the bank, in the present case, had no right to charge the account of the Peace Jubilee Company with the overdraft and thus defeat the claim of the fireworks company. *Dolph v. Cross,* 153 Iowa 289, 133 N. W. 669. Whether the deposit was special or general depends upon the understanding of the parties at the time it was made. If it was deposited for the particular purpose of paying the checks which had been drawn by the Peace Jubilee Company in favor of the Hitt Fireworks Company, it was a special deposit. *Stephens v. Chehalis Nat. Bank,* 80 Wash. 254, 141 Pac. 340.

Looking, then, to the question as to whether the deposit was special, it appears that, under the original contract as modified by the resolution referred to, the Hitt Fireworks Company had a lien on all the moneys received at the gate which went into the Stadium, and a further lien of twenty-five cents per capita for all persons passing from the Jubilee grounds into the Stadium, and that it was agreed and understood that this money was to "be held in a separate fund by the

treasurer, M. M. Ogden," to be applied on the total amount of the contract between the Northwest Peace Jubilee and the Hitt Fireworks Company. On the night of the third of July, and the fourth, when the parties met, the money was on the table or desk, and Mr. Hitt of the fireworks company was told that it was there and it was his money. He preferred not to take it, not desiring to handle that sum of money at that time of night. Checks were given and the money taken by Mr. Ogden and placed on the floor of the vault in the bank. At the time the checks were given, there was assurance by Mr. Ogden that they were good and in effect would be paid. The only reasonable inference to be drawn from the evidence is that the checks were to be paid out of the money then on the table which was to be deposited in the bank. This being true, the deposit when made was a special deposit. The bank, therefore, had no right to charge the account of the Peace Jubilee Company with this overdraft to the prejudice of the Hitt Fireworks Company.

The next question which arises is whether the bank had notice that the deposit was special and not general. It is argued that, since the money came into the possession of Mr. Ogden as treasurer of the Peace Jubilee Company, knowledge in that capacity of the special nature of the deposit would not be imputed to the bank. It is true that, when the money first went into Mr. Ogden's possession, it was received by him as treasurer of the Jubilee Company. In the capacity of treasurer of that company, he drew the checks. Sometime subsequent to his doing this and his placing of the money on the floor of the vault in the bank, he ceased to hold the money as treasurer of the Peace Jubilee Company, and held it as cashier of the bank. It could not be said that, as treasurer of the Jubilee Company, he would have the right to open the doors of

the bank at twelve o'clock at night, open the doors of the vault and place the money on the floor thereof. At least from the time the money entered the bank, it was held by Mr. Ogden as cashier of the bank and thus continued until on the morning of the seventh, when it was entered on the books of the bank.

There can be no question that, under these circumstances, the knowledge of the bank's cashier was knowledge to the bank. From the time he received the money until it was placed upon the floor of the vault in the bank, the transaction was immediate and continuous and the thing that he held as treasurer of the Jubilee Company was the same subject-matter which he held as cashier of the bank. The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643. Applying the rule to the facts in the present case, Ogden had in mind the special nature of the deposit to be made when the money was entrusted to him and checks drawn and delivered, or he had acquired this knowledge so recently as to reasonably warrant the assumption that it was present in his mind when he ceased to hold the money as treasurer and began holding it as cashier.

In *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 69 N. E. 185, 102 Am. St. 248, a depositor, desiring to withdraw his deposit and commit it to a trust company, received from the bank cashier a suggestion as to a particular trust company and drawing a check delivered it to the cashier with instructions to deposit the

amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank which he was carrying as cash. It was there held that, even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, the transaction amounting to the payment of the depositor's check merely with the evidences of the cashier's indebtedness and the bank was charged with knowledge of the fraudulent transaction through its cashier.

In *Smith v. Anderson,* 10 N. Y. Supp. 278, the plaintiff delivered moneys to the president of a bank to be deposited therein, and the latter, without plaintiff's knowledge or consent, deposited them in his own name as her attorney and afterwards unlawfully appropriated a large part to his own use. It was held that the bank was liable, since it was chargeable with the knowledge possessed by its president. That case was cited with approval in *Orme v. Baker,* 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. 968. Knowledge of the cashier, even though acquired away from the bank, may be imputed to the bank. *Houghton v. First Nat. Bank,* 26 Wis. 663, 7 Am. Rep. 107.

The case of the *Washington Nat. Bank v. Pierce,* 6 Wash. 491, 33 Pac. 972, 36 Am. St. 174, is distinguishable. There the communication to the president of the bank was made not only while he was away from the bank and engaged in another transaction, but was made without reference to the bank's business and was only a casual remark while the parties were engaged upon other matters. Here the transaction of delivering the checks and depositing the money was deliberate and specific, the subject of the conversation being then in the custody of the treasurer and subsequently in his custody as cashier.

Something has been said about the lien provided for in the contract not working an equitable assignment. Whether this is true, it is not necessary to determine, because subsequently a fund came into existence and the right of the fireworks company to it was recognized and the checks were given only for the purpose of avoiding the necessity of Mr. Hitt's taking into his possession so much money at such a late hour at night. The case of *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562, was where assignment only was relied upon. In this case, the facts show not only an assignment, but a recognition of the right to the fund. It has been suggested that Mr. Hitt, by accepting the checks, waived his right to rely upon a special deposit, but under the facts in this case this position is not meritorious.

Whether the bank, the respondent, would be liable on the theory of estoppel by reason of the fact that its cashier represented that the checks were good and would be paid, it is not necessary here to determine.

The judgment will be reversed and the cause remanded with directions to the superior court to grant a new trial.

MOUNT, MITCHELL, HOLCOMB, and TOLMAN, JJ., concur.

ON REHEARING.

[Department Two. March 31, 1921.]

PER CURIAM.—In the petition for rehearing on this case, issue was taken with a statement in the opinion to the effect that the money was taken to the bank by Mr. Ogden and placed upon the floor of the vaults therein. In legal effect, assuming that the statement in the opinion is incorrect, the result would be the same. It can make no difference whether Mr. Ogden himself took the money to the bank and caused it to be placed upon

the floor of the vault or whether he directed that it be thus disposed of by others. In the testimony referring to this matter, Mr. Ogden in one place states:

"The receipts of the various nights were taken down to the bank that evening by several of us to be placed on the floor of the vaults, and Mr. Morse coming down the next morning and having the entries made on his pass book."

Mr. Morse was cashier of the Peace Jubilee Company. As stated in the opinion, on the nights of July 2, 3 and 4, when the conversation took place relative to the disposition of the money and the drawing of the checks, Mr. Ogden was present. The money was on the table. It was, at least constructively, in his possession as treasurer of the company and was subject to his direction.

The petition for rehearing will be denied.

[No. 15931. Department Two. January 19, 1921.]

SPOKANE STATE BANK, *Appellant*, v. A. J. PITNER, *Respondent*.[1]

BILLS AND NOTES (118)—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF—DELIVERY. Under Rem. Code, § 3407, providing that intentional delivery of a note, passed from the maker's possession, will be presumed until the contrary is proven, defendant has the burden of proof and right to open and close, where the note was offered in evidence without objection and defendant admitted his signature and relied upon an affirmative defense.

SAME (141)—ACTIONS—EVIDENCE—OWNERSHIP AND PAYMENT OF VALUE. A bank suing on a note taken after maturity and for collection only, cannot claim to be a bona fide holder for value.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered May 10, 1920, upon

[1]Reported in 194 Pac. 969.

the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

E. B. Quackenbush, for appellant.

MITCHELL, J.—Suit to recover on a promissory note, including an attorney's fee. The complaint is in the usual form where made by a holder other than the payee. The answer consisted of general denials, together with affirmative defenses of infirmities in the note including want of consideration, of which it was alleged the plaintiff was aware before taking the note after maturity. Plaintiff denied the new matter contained in the answer by its reply.

Counsel for plaintiff concluded its opening statement to the jury by saying:

"The answer shows reasons which will be explained to you by Mr. Pitner's counsel why he does not wish to pay for the note, and I think, as far as the defense is concerned, the denial of the matters there set up by the plaintiff will be the matters principally tried to the jury."

Counsel for defendant then stated:

"At this time we are willing to admit that Mr. Pitner, the defendant, signed this note."

The note was offered and without objection received in evidence. Defendant suggested his right to open and close. Plaintiff insisted on that right. The court held the burden was on the defendant. Counsel for plaintiff then read the note to the jury. Upon request of counsel for plaintiff, it was stipulated the court might fix a reasonable attorney's fee. Thereupon counsel for defendant made an opening statement to the jury, confined to the facts set out in the affirmative answer, and then introduced testimony thereunder. Plaintiff followed with rebuttal evidence. The jury

returned a verdict in favor of the defendant, and from a judgment entered thereon, the plaintiff has appealed.

All assignments of error center upon the contention that the trial court erroneously deprived the appellant of the right to open and close the case to the jury. It is argued that, although defendant admitted to the jury his signature to the note, which was admitted in evidence without any objection, nevertheless, since the respondent did not admit the delivery of the note, there was an issuable fact to try out. On the subject of the delivery of negotiable instruments § 3407, Rem. Code, provides:

"And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

That was the situation here. The appellant had the note in its possession in the presence of the jury, the respondent admitted his signature to the note and then proposed to meet the burden cast upon him by the law. However, this feature of the controversy became unimportant later on for the respondent, while testifying, admitted that he signed and delivered the note to the payee.

As to the allegation in the complaint that the appellant was the holder for value, which was denied by the answer, there can be no possible claim of prejudicial or reversible error in the ruling of the court, because the appellant bank, by its president, admitted while testifying, in answer to questions by its own attorney, that it took the note after maturity and for collection only. The facts upon which the respondent depended to defeat recovery upon the note were necessarily matters to be plead affirmatively, which cast the burden upon him. We find nothing in the manner of con-

ducting the trial indicating other than a fair trial to the appellant.

Affirmed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15963. Department Two. January 19, 1921.]

WM. HENRY *et al., Appellants,* v. BRUHN & HENRY, INCORPORATED, *Respondent.*[1]

LANDLORD AND TENANT (144)—ACTIONS FOR UNLAWFUL DETAINER—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether defendant, in unlawful detainer, had a right to an extension of the lease, a reply to the effect that defendant's option for an extension had been forfeited by failure to pay rent in advance, may be met by the defendant by proof that plaintiff had waived payment of rent in advance.

SAME (31)—RENEWALS—OPTION TO RENEW. The right to a renewal of a lease is a substantial right and part of the term itself, and is independent of the payment of rent when rent is not expressly declared to be a condition precedent to the exercise of the privilege.

SAME (124)—ACTION TO RECOVER POSSESSION—DEFENSES—WAIVER OF FORFEITURE. Where the lessor had uniformly acquiesced in the payment of rent after the due dates, he cannot declare a forfeiture for nonpayment of rent in advance and resist an optional renewal of the lease which the tenant elected to renew prior to the expiration of the term or the commencement of an action to forfeit the lease.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 26, 1920, upon findings in favor of the defendants, in an action to recover the possession of leased premises, tried to the court. Affirmed.

J. A. Coleman, for appellants.

E. W. Klein, for respondent.

[1]Reported in 195 Pac. 20.

MITCHELL, J.—The opinion upon a former appeal in this case is reported in 110 Wash. 321, 188 Pac. 506. Plaintiffs leased to the defendant certain real property for a term of five years from February 2, 1914, with the right of the lessee to renew the lease for another five years at the same rental. Upon the expiration of the five years, this action was commenced to recover possession of the premises, upon the ground that the lease had expired and that the defendant continued in possession without right.

The defendant filed an affirmative answer to the effect that, within the knowledge of the plaintiffs, it had elected to renew the lease for an additional five-year period. Plaintiffs filed a reply denying the new matter set up in the answer, and plead affirmatively that the defendant was not entitled to effect a renewal of the lease because it had violated a condition of the lease that the land was not to be plowed but maintained as pasture; and had failed to pay in advance the quarterly rent for the last quarter of the five-year term, commencing on November 2, 1918, and ending on February 2, 1919, or at all during the whole of that quarter. Upon motion of the defendant, the reply was stricken. Upon that appeal, it was decided the reply should not have been stricken, and the cause was remanded with directions to try out the issues presented by the reply.

Upon the new trial, the sole contention was that the defendant had breached the condition of the lease which provided for quarterly payments in advance, by not paying the rent for the last quarter of the five-year period, which became due on November 2, 1918.

Over the objection of the plaintiffs, the respondent was permitted to show that, during the whole five years, it had never paid rent in advance, or at any time (other than the first quarter), until after each quarter

had passed, and then usually upon request of appellant who had never made any objection to that course of dealing. Specifically, the court found:

"That said lease provided that the defendant should pay as rent for said lands the sum of $16 per acre per annum quarterly in advance on the first day of each and every quarter during said term; that the first quarter's rent was not paid in advance, but was paid during the month of February of the first quarter; that thereafter the defendant continued to pay the rent for each quarter, not in advance as the lease provided, but each time after the expiration of the quarter, and sometimes as long as five months after the same was due under the terms of the lease; that the plaintiffs sent statements each time for three months' rent, and at all times the defendant paid the rent promptly when plaintiff called for same and remitted promptly upon the receipt of a statement therefor; that plaintiff never found fault or complained of the manner in which the rent was being paid; that the rent due by the terms of said lease on the 2nd day of November, 1918, was not paid at said time, but was sent to the plaintiff on the 4th day of February, 1919, right at the expiration of the quarter, but before the commencement of this action, which said rent was by the plaintiff returned to the defendant and acceptance refused; that said last quarter's rent was paid by defendant in accordance with a course of conduct that had been followed throughout the five years that said lease had run, and no fault was ever found or protest made by defendants on account of the manner of payment of said rent; that after the first trial of this action in this court the defendant again sent the plaintiffs the accrued rent from November 2, 1918, which was again refused by the plaintiff and returned to defendant."

The trial court held that this course of dealing constituted a waiver on the part of the plaintiffs of the provision of the lease requiring payments of rent

quarterly in advance, and entered judgment dismissing the action. Plaintiffs have appealed.

There is no dispute of the evidence upon which the court's finding rests. It was objected to as being immaterial, and it is now insisted, under the rule of the law of the case, that respondent is foreclosed of the right to answer by proof the affirmative allegations contained in the reply that the rent for the last quarter of the five-year period was not paid in advance (the only alleged breach of the contract relied on at the second trial), other than to show, if it could, that that quarter's rent was paid for in advance; and that, as its proof showed it was not paid in advance, therefore, all the testimony as to the course of dealing in the prior collections was wholly immaterial.

The contention is not tenable. In the former opinion, there was no discussion of the affirmative matters alleged in the reply with reference to whether or not there could be an effective waiver of the stipulation for payment of the rent in advance, nor was there any opinion expressed as to whether or not the right of the lessee to a renewal was in any way dependent upon compliance with the covenant to pay the rent in advance. On the contrary, the decision answered the erroneous theory upon which it appeared the reply had been stricken, viz.: that it was inconsistent with the allegations of the complaint, and remanded the cause for a new trial upon the two issues presented by the reply. Certainly, by all the rules of pleading and fair play, after the reply was reinstated, the respondent was at liberty to meet the allegations thereof by any legitimate proof it had which would be effective in the law.

If the testimony as to the course of the conduct of the lessors showing uniform chosen delays in the collection of rents was immaterial, it was so only because

the lease should be construed in such way that the right of the lessee to a renewal was independent of the covenants to pay rent; the rule in such cases being that:

"Where the payment of rent is not expressly declared to be a condition precedent to the exercise of a privilege to have a renewal, the fact that the lessee is in arrears for rent when he elects to take a renewal taken alone does not deprive him of his right to a renewal." 2 Underhill, Landlord and Tenant, p. 1386, § 812.

See, also, *Tracy v. Albany Exchange Co.*, 7 N. Y. (Selden) 472, 57 Am. Dec. 538. In such event, the admission of the testimony would be without prejudice, and respondent entitled to judgment, since this is the only alleged breach relied on by the appellant in the second trial.

On the other hand, if it be claimed that the privilege of a renewal was not independent of the covenants to pay rent, then the testimony objected to was important and material, under the well settled rule that forfeitures are not favored. The right of a renewal provided for in this lease is a substantial right. It is, in effect, a part of the term itself.

"Where a lessor, by his acquiescence in his tenant's delay in paying the rent, has induced his tenant to believe that a strict performance of his covenant to pay rent at times specified in the lease will not be required of him, equity will not permit the landlord to enforce a forfeiture, where under the circumstances it would be inequitable, and full compensation can be made to the landlord for the consequences of the tenant's default in paying rent." 1 Underhill, Landlord and Tenant, p. 665, § 412.

This rule is based upon sound principles of justice and right. It is applicable here, where the tenant had elected to renew and actually tendered payment of all

rent in arrears prior to the commencement of this action.

During the whole period of five years, the appellants had been entirely content to delay until it suited them to send statements or call in person for the rents, long after they were due, at all of which times they received prompt payments; and, even in the complaint in this cause, no fault of the respondent in not paying the last quarter's rent on its due date is alleged upon which a termination of the lease was claimed; that charge was reserved until the reply was filed; nor is the solvency of the respondent in any way questioned.

We are satisfied the judgment appealed from is right and it is affirmed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15920. Department Two. January 19, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. A. W. ELY, *Appellant*.[1]

CRIMINAL LAW (301)—TRIAL—INSTRUCTIONS—FORM AND LANGUAGE. It is not error to refuse a request to address the instructions to each juror individually, where correct general instructions to the jury as a body covered the question.

SAME (314)—TRIAL—MISLEADING INSTRUCTIONS—REQUESTS—SPECIAL ISSUES—ABSTRACT INSTRUCTIONS. An instruction to acquit if the jury can reconcile the evidence upon any reasonable hypothesis consistent with innocence, sufficiently covers a requested instruction to acquit, if the evidence raises a reasonable doubt that the charge made by the prosecuting witness was induced by nervousness or a mistake; especially where the requested instruction would have been misleading.

CRIMINAL LAW (451)—APPEAL—HARMLESS ERROR—ARGUMENTS AND CONDUCT OF COUNSEL. It is not prejudicial misconduct for the prosecuting attorney to announce that the state waives any criminal prosecution, upon the accused's refusing to answer a question on the

[1]Reported in 194 Pac. 988.

ground that it might tend to incriminate him, when the court was not requested to specially advise the jury to disregard it.

RAPE (1, 27)—ELEMENTS OF OFFENSE—UNCONSCIOUSNESS OF FEMALE—EVIDENCE OF—SUFFICIENCY. Accused may be guilty of rape as defined by Rem. Code, § 2435, subd. 5, by having sexual intercourse with a woman who was at the time known by him to be "unconscious of the nature of the act," notwithstanding she was not unconscious in the sense of having lost her senses, it only being necessary that she did not know what he was doing.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered December 8, 1919, upon a trial and conviction of rape. Affirmed.

Sharpstein, Smith & Sharpstein, for appellant.

Earl W. Benson and *A. J. Gillis,* for respondent.

MOUNT, J.—The defendant in this action was convicted by a jury on a charge of rape. The information upon which the defendant was convicted recites that the defendant on the third day of July, 1919,

"did . . . perpetrate an act of sexual intercourse with Ruth C. Stewart, a female over the age of ten years, and against the will and without the consent of the said Ruth C. Stewart. The said Ruth C. Stewart then and there not being the wife of said A. W. Ely and she then and there being unconscious of the nature of said act of sexual intercourse and that such unconsciousness on the part of said Ruth C. Stewart was then and there known to said defendant A. W. Ely."

On the trial of the case, Miss Stewart testified, in substance, that, on the third day of July, 1919, she went to the office of the defendant, who is a doctor, for the purpose of getting some glasses left there to be repaired; that while she was there she told the defendant that she was going to another doctor to be examined physically because she was of the impression that she had appendicitis; that Dr. Ely told her he was a physician and would make the examination; that he

thereupon had her get upon an operating table; that he examined her in order to determine whether she was afflicted with appendicitis; that he found no symptoms of appendicitis; that he thereupon examined her with reference to her ovaries; that in order to do this he put her feet in some stirrups on the operating table, elevated her knees and placed a sheet over her knees and after a digital examination, committed the crime of rape upon her; that, as soon as she discovered what he was doing, she got down from the table, called him a "darn fool" and left the office. Thereupon she went to a friend and explained to the friend what had occurred. The friend called the prosecuting attorney, and the three of them, in the afternoon of that day, returned to the doctor's office and asked him for an explanation. That afterwards she was examined by two other doctors.

The appellant argues, first, that the court erred in refusing to give the following instruction:

"Before the defendant can be convicted, each member of the jury must be satisfied beyond a reasonable doubt, as defined in these instructions, and if any one of you after having consulted with the other members of the jury, entertains such a reasonable doubt, then such member of the jury will not be justified in finding the defendant guilty."

It is argued by the appellant that this instruction is correct for the reason that, if any juror is not convinced of the defendant's guilt beyond a reasonable doubt, it is the duty of that juror to vote for an acquittal. It is conceded that, in the case of *State v. Robinson,* 12 Wash. 491, 41 Pac. 884, and *State v. Cushing,* 17 Wash. 544, 50 Pac. 512, this court held that an instruction of this character was not required to be given. It may be correct to say that, if any juror has a reasonable doubt of the guilt of the accused, such

juror is not required to vote for a conviction, but we think it is not necessary that the court should give this specific instruction, especially where the general instruction covers the question as it does in this case. Since the case of *State v. Robinson, supra,* we have held in a number of cases that a requested instruction of this character need not be given. The latest case upon this question is *State v. Chittenden,* 111 Wash. 213, 190 Pac. 232. We do not desire to depart from the rule which has been followed in this state since the 12th Washington above noted. There was no error therefore in refusing this instruction.

Appellant also argues that the court erred in refusing to give the following instruction:

"You are instructed that, if the evidence in this case raises a reasonable doubt in your mind that the charge made by Miss Stewart was superinduced by nervousness or by a mistake or understanding as to what actually occurred, you should give the defendant the benefit of the doubt and acquit him."

The court in his instructions to the jury had defined a reasonable doubt, and had told the jury the elements which were necessary to be proved and in that connection the court told the jury:

"If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find him not guilty."

We think these instructions were sufficient to cover the question presented by the instruction requested. It is no doubt true, as we said in *State v. Ward,* 96 Wash. 550, 165 Pac. 794, that

"Instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury."

We think the instruction given in this case had no tendency to mislead the jury, while the instruction offered, we think, had that tendency. It is true that Dr. Ely, when testifying in his own behalf, testified that women who are subject to discharges such as are commonly known as lochiorrheal discharges are frequently very nervous; that women of that type are what is known as neurasthenics and they are more or less highly sensitive. But it was not shown that the prosecuting witness was suffering from lochiorrheal discharges nor was there any evidence to the effect that she was nervous while she was being examined. The only evidence of nervousness at all was that, when she discovered what the doctor had done or was attempting to do, she immediately got off the table, was angry and left the room. But there was no evidence in the record that she was a neurasthenic. It follows that it was not the duty of the court to give the instruction, because the instruction requested would have been misleading.

It is next argued on behalf of appellant that the court should have discharged the jury during the trial on account of the misconduct of the prosecuting attorney. Upon the trial, while Dr. Rhodes was testifying as a witness in behalf of the state, he was asked this question:

"Did you give her (Ruth Stewart) any professional treatment at that time? A. I did, yes, sir. Q. State what it was. State the condition you found her in and what you did. A. My answer might tend to incriminate me."

Counsel for the state then said:

"I think in an action for rape, no criminal prosecution could lie against a physician giving any treatment within a few hours after the offense is alleged to have been committed, for the prevention of conception.

THE COURT: I have no view on it, if you have any authority, I will hear you; it is possible that is the law. Q. I will ask you Dr. Rhodes, if you gave Ruth Stewart any treatment tending to prevent an infection to which she might have been exposed."

An objection to this question was sustained. The doctor then answered:

"I can answer as to the examination, but not as to the treatment. Q. Now, doctor, I want to repeat the question that I asked you a while ago, and do not answer it until the court directs you to, and before submitting the question the state here and now waives any prosecution."

Counsel for appellant objected to that statement. Then the prosecuting attorney said:

"We waive any prosecution of Dr. Rhodes for any treatment that he may have given Ruth Stewart on or about the 3rd day of July, 1919, and this is for the purpose of qualifying him as a witness for the state. Q. Now I will ask you, doctor, what treatment did you give Ruth Stewart, when she called at your office on the 3rd day of July, 1919?"

Thereupon counsel for the appellant moved the court to discharge the jury on the ground, "that it will be impossible from this time on for the defendant to have a fair and impartial trial under the actions taken by the prosecuting attorney." This motion was denied and an exception taken, and it is now argued that the court erred in not discharging the jury.

We assume, without deciding the question, that this was misconduct of the prosecuting attorney, but we are clearly of the opinion that it was not such misconduct as to require the discharge of the jury. We have held several times that, where the prosecuting attorney is guilty of misconduct, it is the duty of the de fendants to ask the court to specifically direct the attention of the jury to the improper conduct and advise

that such conduct is not to be considered by them. In the case of *State v. Johnson,* 103 Wash. 59, 173 Pac. 723, we said:

"We have held frequently that a mere objection to improper argument on the part of an attorney is not enough; for, being bound to credit the jury with common understanding, we must, in the interest of finality in judicial proceedings, presume that the jury would understand that the argument to which an objection has been sustained was not to be considered in making up a verdict. If the misconduct is such as to warrant the belief that an improper impression may be carried away by the jury, it is incumbent upon the appellant to ask the court to specially direct the attention of the jury to the improper argument and to advise it that such argument is not to be considered. *State v. Regan,* 8 Wash. 506, 36 Pac. 472; *State v. Bailey,* 31 Wash. 89, 71 Pac. 715; *State v. Meyerkamp,* 82 Wash. 607, 144 Pac. 942; *Cranford v. O'Shea,* 75 Wash. 33, 134 Pac. 486; *State v. Johnson,* 83 Wash. 1, 144 Pac. 944."

See, also, *State v. Hood,* 103 Wash. 489, 175 Pac. 27. No request was made for the court to tell the jury not to consider the misconduct of the prosecuting attorney.

Counsel for appellant relies upon the rule in *State v. Montgomery,* 56 Wash. 443, 105 Pac. 1035, 134 Am. St. 1119. That was an extreme case where the prosecuting attorney deliberately "stated to the court, in the presence of the jury, that the witness had stated the contrary to him many, many times; that the witness had been tampered with, and bought, etc." In that case we held that there could not be a fair trial to the jury because of the misconduct of the prosecuting attorney. But the case at bar, we think, falls far short of any intention on the part of the prosecution to mislead either the court or the jury. There was

no reversible error in denying this request to discharge the jury.

Appellant also argues that the evidence is insufficient to justify a conviction. We deem it unnecessary to discuss or even set out more in detail the facts in the case. We are convinced from reading the entire record that there was sufficient evidence to go to the jury.

Appellant finally argues that, since this prosecution was had under § 2435 of the statute (Rem. Code), which defines rape as, "an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upward not his wife . . . (5) When she is at the time unconscious of the nature of the act, and this is known to the defendant"

there can be no conviction where the prosecuting witness is a grown woman of education in the possession of all her faculties, not sleeping, drugged or stupefied in any way. Subdivision 4 of that section provides:

"When her resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anesthetic agent administered by or with the privity of the defendant; or (5) When she is at the time unconscious of the nature of the act, and this is known to the defendant."

We think, under subd. 5 of that section, it is necessary that the proof shall go to the effect that she was unconscious of the nature of the act—that is, that she did not know that the act was being perpetrated upon her.

The evidence in this case, if the prosecuting witness is to be believed, is to the effect that she supposed the doctor was examining her physically with his fingers

and that she did not know at first that he was doing anything wrong. We are of the opinion that it was not necessary for her to be unconscious in the sense that she had lost her senses, but that she might have all her faculties and not know of the nature of the act at the time it was being done. The prosecuting witness testified that she did not know what the doctor was doing until after he had committed the crime.

We find no reversible error in the record. The judgment must therefore be affirmed.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15970. Department Two. January 19, 1921.]

MARY CROWLEY, *Respondent*, v. MATT BAUMGARTNER, *Defendant*, MAMIE BAUMGARTNER, *Intervener*, *Appellant*.[1]

JUDGMENT (258)—FOREIGN JUDGMENTS — CONCLUSIVENESS — PERSONS BOUND—WIFE OF DEFENDANT. In an action upon a foreign judgment recovered against a husband alone, the wife may not intervene and set up defenses to the merits, as that was foreclosed in the courts of the sister state, under the full faith and credit clause of the constitution.

HUSBAND AND WIFE (90, 95)—COMMUNITY PROPERTY—ACTIONS—INTERVENTION BY WIFE—ENFORCEMENT OF FOREIGN JUDGMENT. In an action upon a foreign judgment recovered against a husband alone, it may be shown by proper proceedings that it is or is not for a community debt.

Appeal by intervener from a judgment of the superior court for Spokane county, Blake, J., entered May 6, 1920, upon findings in favor of the plaintiff, after striking the complaint in intervention, in an action on a foreign judgment, tried to the court. Affirmed.

[1]Reported in 194 Pac. 970.

John M. Gleeson, for appellant and intervener.

Horning & McEvers and *J. Webster Hancox,* for respondent.

TOLMAN, J.—Mary Crowley, respondent here, on April 18, 1919, obtained a judgment in the district court of the state of Idaho, based on personal service against the defendant, Matt Baumgartner. Thereafter respondent brought suit on such judgment in this state against the same defendant. Appellant Mamie Baumgartner intervened in the cause, and by her amended complaint in intervention alleged that she and the defendant had been wife and husband since January 5, 1898, and that they had resided continuously in the state of Washington for fourteen years last past, and had never resided in the state of Idaho, and then proceeded to set up defenses on the merits, the same, in effect, as were pleaded by the defendant in the Idaho court.

On motion, appellant's amended complaint in intervention was stricken, except as to the allegations of marriage and residence in Washington, and she declined to plead further. The cause coming on for trial before the court sitting without a jury, the judgment of the Idaho court was offered in evidence, no evidence being offered on behalf of the defendant or the intervener, and thereafter findings were made and a judgment entered dismissing the complaint in intervention, and awarding recovery against the defendant for the amount of the Idaho judgment, plus interest and costs. The intervener alone appeals.

Appellant seems to contend that, the civil disabilities of married women having been abolished in this state, the wife should have been permitted to defend this action, under Rem. Code, § 182. Whatever may have been her rights in the courts of Idaho prior to

the determination of the issues there, the argument advanced is now no longer pertinent. The Idaho court was one of general jurisdiction. It had jurisdiction of the parties and of the subject-matter, and after it had found against the defendant and entered its solemn judgment to that effect, the courts of this state, under the full faith and credit clause of the Federal constitution, may not permit the defendant to again try the case on its merits, nor permit the wife or anyone else in his behalf to urge again the defenses which had been foreclosed by the judgment of the Idaho court.

True it is, whether the judgment against the husband alone be a foreign or domestic one, by proper proceedings it may be shown that it is or is not a community debt. *Gund v. Parke,* 15 Wash. 393, 46 Pac. 408; *Woste v. Rugge,* 68 Wash. 90, 122 Pac. 988. No such relief was sought here.

Judgment affirmed.

HOLCOMB, MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 16027. Department Two. January 19, 1921.]

GEORGE B. COOLEY, *Appellant*, v. E. L. DAVIS *et al.*, *Respondents*.[1]

CONTRACTS (36-1)—CORPORATIONS (56)—REQUISITES AND VALIDITY—VALIDITY OF ASSENT—DURESS—RESCISSION OF SALE OF CORPORATE STOCK. A transfer of shares of stock in a corporation will not be cancelled for duress and coercion, upon plaintiff's evidence that it was made under threats of prosecution for making false entries and appropriating money and merchandise to his own use, where he was not restrained of his liberty, and came and went at his will for several days and of his own volition sought to settle the matter.

Appeal from a judgment of the superior court for Grant county, Truax, J., entered November 15, 1920, dismissing on the merits an action for rescission, tried to the court. Affirmed.

D. S. Evans and *Crandell, Williams & Crandell*, for appellant.

Voorhees & Canfield, for respondents.

TOLMAN, J.—The appellant, as plaintiff, brought this action to rescind a transfer of forty-six shares of the capital stock of the respondent corporation, which he alleged he had made to respondent Davis without consideration, and under duress and coercion. From a judgment denying him relief, he appeals.

It is manifestly impossible to set out the evidence with any degree of completeness, covering as it does several years of dealings between the parties, and we therefore content ourselves by saying that appellant as an officer of the respondent corporation, had charge of its books and cash, and the evidence fairly establishes that he was untrue to his trust, made false entries, and profited personally at the expense of the

[1]Reported in 194 Pac. 968.

corporation and of respondent Davis, the only other stockholder therein. The amount to which he so profited does not very clearly appear, but we are satisfied that it was sufficient as a consideration for the transfer of the stock. When confronted by the evidence, he seems to have admitted the making of the false entries, which is an offense under our statute, Rem. Code, § 2661, but claims that the credit thus obtained was never realized upon by him.

Appellant's testimony as to the facts which he claims constituted duress was to the effect that respondent Davis and one Rinehart, an accountant employed by Davis for the purpose of checking up the books of the corporation, pointed out that he had made false entries, appropriated money and merchandise to his own use, made a false return of the business of the corporation to the collector of internal revenue for income tax purposes, and threatened to have him arrested for these offenses, or some one of them, though the making of such threats is denied by them. But appellant was in no manner restrained of his liberty, and after these charges and threats, if any, were made, came and went at will for several days, and of his own volition sought to settle the matter. Taking appellant's own version of the language used in making the threats, their nature and the extent thereof, they fall far short of constituting duress. In *Ingebrigt v. Seattle Taxicab & Tr. Co.*, 78 Wash. 433, 139 Pac. 188, the subject of duress was fully discussed, and the rule correctly defined, and facts much stronger than here appear were held to be insufficient to establish it. With the rule thus laid down we are content. The judgment is affirmed.

HOLCOMB, MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15898. Department Two. January 20, 1921.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Appellant*, v. ALFRED LAWRENCE *et al.*, *Respondents*, UNIVERSITY PHARMACIES, INCORPORATED, *Defendant*.[1]

LIENS (1)—EQUITABLE LIENS—REQUISITES. An equitable lien not created by express terms, must arise by necessary implication from the terms of the agreement construed with reference to the attendant circumstances; and none was intended, where mortgages had been foreclosed and in consideration of deeding the property back to the mortgagor and accepting new mortgages, the mortgagor agreed to have deeded to himself certain described property then held in trust for him by relatives, which he agreed to hold while indebted on the mortgages, further agreeing to apply on his indebtedness any proceeds that he might realize on the sale of the property.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 1, 1919, upon findings in favor of defendants, in an action to foreclose an equitable mortgage. Affirmed.

Farrell, Kane & Stratton, for appellant.

Milo J. Loveless, Peters & Powell, and *Marion Edwards*, for respondents.

MAIN, J.—The purpose of this action, so far as the appeal is concerned, was to foreclose an alleged equitable lien claimed to have been created by a written instrument. From a judgment denying foreclosure, the plaintiff appeals.

The appellant, on and prior to November 28, 1914, when the writing in question was executed, was a corporation engaged in the banking business, and for convenience it will be referred to as the bank. Prior to this time, one Alfred Lawrence had executed and delivered to the bank certain mortgages which had been

[1]Reported in 194 Pac. 971.

foreclosed, and sheriff's deed would soon be obtained. Lawrence, prior to this time, had conveyed his property not covered by the mortgages to his children and to his former wife, but these conveyances vested only the legal title in them and the property was held in trust for him. Not wishing to lose the property foreclosed on, Lawrence proposed to the bank that, if it would deed back to him the property covered by the mortgages which had been foreclosed, he would give new mortgages upon the same property covering his indebtedness and he would also have reconveyed to him the property which stood in the name of his wife and children. This proposition was accepted by the bank and reduced to writing in the form of a letter, this letter being the document alleged by the bank to be an equitable mortgage. The letter is as follows:

"Seattle, Washington, November 28th, 1914. American Savings Bank & Trust Company, Seattle, Washington. In regard to rearranging my affairs with the bank, I propose as follows: If you will deed back to me the three pieces you now have foreclosed on and take back a separate mortgage on each piece, I will have deeded back to me the following described property, now standing in the names of my two sons and their mother in trust for me, to wit: (Description.)

"I also agree to hold said property in my own name while indebted to your bank, and if I succeed in selling any of the within mentioned properties to apply as much of it as I am able on my indebtedness to the bank.

"Alfred Lawrence.

"It is hereby agreed on behalf of the American Savings Bank & Trust Company that, upon compliance with the above agreement, said bank will take three new mortgages covering the indebtedness of said Lawrence and release the foreclosure heretofore had against him.

"American Savings Bank & Trust Company. By J. P. Gleason, Manager."

In accordance with this agreement, Lawrence had the properties mentioned therein conveyed to him and the bank deeded back to him the properties on which it had foreclosed. Lawrence executed new mortgages to the bank covering these latter properties, but not the ones mentioned in the letter. The bank immediately recorded the mortgages, but the letter was not recorded until April 26, 1916, approximately a year and a half after the day of the transaction. On August 14, 1918, Lawrence deeded to his former wife certain of the property described in the letter; and on August 28, 1919, Mrs. Lawrence mortgaged the property to the respondents C. W. Arland and wife, which mortgage was recorded on August 28, 1919.

In November, 1918, the bank began foreclosure of the mortgages given it by Lawrence on November 28, 1914, and alleged that, as additional security for the indebtedness covered by these mortgages, Lawrence had signed and delivered the letter set forth above and that, by reason of such letter, the property mentioned therein was subject to a prior lien of the bank for the payment of Lawrence's indebtedness. As already indicated, the trial court held that the letter did not create an equitable lien.

The first, and as we believe the controlling, question is whether by the letter an equitable lien was created. In considering this question it will be assumed, but not decided, that the recording of the letter would operate as constructive notice to subsequent purchasers and incumbrancers. From the facts stated, it appears that the respondents Arland and wife took their mortgage subsequent to the time when the letter was made a matter of record.

It is a general rule that, where an express executory agreement in writing sufficiently indicates an inten-

tion to make the particular property described therein a security for a debt or obligation, an equitable lien is created upon the property so indicated which is enforcible against the lands, not only while in possession of the original contractor, but also as against incumbrancers with notices. 3 Pomeroy's Eq. Jur. (4th Ed.), § 1235; 19 R. C. L. 273; 25 Cyc. 665.

The agreement in question does not expressly provide that the property shall be held as security for the indebtedness or that the bank shall have a lien thereon. If such a lien exists, it must, therefore, arise by implication. It seems to be the doctrine of the United States supreme court, as stated in *Walker v. Brown*, 165 U. S. 654, that an intention to create such a lien, when it is not created by express terms, must arise by necessary implication, from the terms of the agreement construed with reference to the situation of the parties and the attendant circumstances.

In *In re Springer's Estate*, 97 Wash. 546, 166 Pac. 1134, the court construed a power of attorney, which it was claimed established an equitable lien upon real estate. It was there held that the words,

"my said interest in said estate to be received by my said attorney and held by him in trust as collateral to secure payment of any promissory notes or renewals that I may at any time owe to the First National Bank of Crestline, Ohio,"

was not sufficient to create an equitable lien. In the case of *Hossack v. Graham*, 20 Wash. 184, 55 Pac. 36, a mortgage had been made which covered certain property and was in the usual form for real estate mortgages. There was an additional clause in the mortgage which provided that the mortgagor should pay twenty-five per cent of the money received from sales of all the property which it should thereafter make to a certain bank to be applied upon the indebtedness cov-

ered by the mortgage. The property covered by this latter clause was not included in the property mortgaged, though as already stated it was a paragraph in the same instrument. The question arose as to whether by this clause the parties intended to create an equitable lien. The holding in that case seems to us controlling here. It was there said:

"It is insisted by the appellant that the language of the clause shows that the mortgagor intended to absolutely mortgage certain of its properties, and twenty-five per cent of the proceeds of the sale of certain of its other property, as security for the $80,000 and interest; while the construction placed upon it by the respondent is to the effect that no lien is created upon the lots described under the twenty-five per cent clause, but that it is simply an agreement to pay or appropriate money, which is personal between the parties to the agreement. We think the latter construction is the correct one. In support of appellant's contention is cited § 1235, Pomeroy's Equity Jurisprudence, which is as follows:

" 'The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforcible against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice.'

"This statement of the law is in harmony with universal authority, but we do not see that it can be made applicable to appellant's interest in this case, for the statement assumes the very question which is in dispute here, viz., whether or not the party promised to convey or assign or transfer this property as security.

It is the intention of the parties to the contract, which is to be determined from the phraseology of the instrument. Further on in the same section Mr. Pomeroy says that the agreement, before it can be determined to constitute a lien, 'must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given or transferred as security for the obligation.' And so with § 1048, quoted also by appellant, to the effect that—

"'Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee . . . . then the rule is universal that such heir, devisee, successor or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary.'

"The same fact is assumed, viz., that the property is already impressed with, or subject to, a trust. The same thing may be said of the quotation from Jones on Mortgages § 162, for while it is no doubt true that it is not necessary that the contract should be, in express terms, a security, for the reason that equity will frequently imply a security from the nature of the transaction between the parties, yet, according to Mr. Jones, the essence of the contract is the intention of the parties to create a security. . . . .

"And so with all the cases cited by the appellant, both those from the United States supreme court and the Federal cases, and all other cases so far as we have been able to ascertain, maintain the lien where it was stipulated that the property concerning which the agreement was made should constitute a lien for the payment of the obligation. In the case at bar there is no stipulation of this kind. If it had been the intention of the parties to have created a lien on a one-fourth interest in these lands embraced in the second description, it would have been an easy matter to have made that fact appear in the mortgage. But it is especially stated that this property shall not be cov-

ered by this mortgage, and it seems to us that the language simply indicates a separate agreement in relation to the property falling under the second description. The fact that the agreement is incorporated in the same instrument with the mortgage gives it no other or different legal effect than it would have, had it been an agreement detached from and independent of the mortgage contract; and we do not think it can be said, under any authority, that, if this had been an independent contract, it would have created a lien on the property in dispute, or that it would have been anything more than a naked promise to pay a given amount of money upon the happening of a certain contingency."

The only difference between that case and the present is that here there was an express agreement on the part of Lawrence to hold the property covered by the letter in his own name, while there there was no such express language. But this difference does not make a controlling distinction. The purpose of the language requiring Lawrence to hold the title in his own name while he was indebted to the bank is plain when it is recalled that, prior to the transaction, the legal title to the property was in his former wife and his children, he only having a trust estate. The bank doubtless considered that it was to its advantage that the legal title to the property remain in its debtor during the time that the indebtedness existed.

In the *Hossack* case, while it was not expressly so provided, it was undoubtedly contemplated by the parties that the title to the property mentioned in writing would remain in the name of the mortgagor until it was sold or the indebtedness paid. If it had been the intention of the bank and Lawrence to have created an equitable lien, it would have been easy for them to have so stated in the writing. The purpose of the writing, apparently, was to give Lawrence an oppor-

tunity to pay his indebtedness to the bank and also avoid the necessity of the bank's taking and holding real estate until it could dispose of it in due course.

The case of *Pinch v. Anthony,* 8 Allen (Mass.) 536, is distinguishable because there the writing expressly provided that the indebtedness should be a "charge" on the estate of the parties executing the instrument. The language there used in itself indicated an intention to create an equitable lien. There is no corresponding or similar language in the writing which we are called upon to construe in this case.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 15813. Department Two. January 20, 1921.]

JOSEPH MICHAUD, *Appellant,* v. BURBANK COMPANY *et al., Respondents.*[1]

AGRICULTURE (5) — LIENS — RIGHT TO. A farm laborer cannot claim a lien for caring for a crop of alfalfa by the customary seasonable conveyance of water from irrigation flumes, under Rem. Code, § 1131, giving a lien to one who "clears, grades, fills or otherwise improves" property at the request of the owner.

MASTER AND SERVANT (2) — THE RELATION — EVIDENCE OF EMPLOYMENT. The owner of land is not liable for the wages of a farm laborer employed by an independent contractor who was to reduce wild land to a state of cultivation and grow one crop thereon.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered December 11, 1919, dismissing on the merits an action to foreclose a laborer's lien, tried to the court. Affirmed.

[1]Reported in 194 Pac. 985.

Chas. W. Johnson, for appellant.

Reynolds & Bond and *Sharpstein, Smith & Sharpstein,* for respondents.

MITCHELL, J.—During the summer and fall of 1918, the plaintiff performed work as a farm laborer. His services consisted in looking after the seasonal irrigation of, and helping to harvest, a crop of rye and two crops of alfalfa. The premises had already been provided with flumes and ditches for the distribution of water over the lands that had been leveled and seeded. The flume was new, but it seems the plaintiff performed an almost negligible amount of work in patching the flume at a few places, according to the customary requirements at the hands of farm laborers in such cases. Otherwise his work consisted chiefly of opening and keeping open the shallow surface furrows to convey water over the fields, which, according to the usual manner of cultivating alfalfa, has to be done more or less each season with more or less changes in the immediate location of such trenches from year to year. Not having been paid his wages in full, the plaintiff filed a notice of claim of lien upon the real property for the balance due for labor performed "in making improvements by leveling, fluming, clearing and preparing for a state of cultivation" the land described. This action was brought to foreclose that lien. There was a judgment dismissing the action, upon a trial of the case, from which judgment the plaintiff has appealed.

Appellant relies on Rem. Code, § 1131, as follows:

"Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same . . . . has a lien upon such real property for

the labor performed, or the material furnished for such purposes."

It is clear that, if the claim set up is lienable under the statute, it must be so because of the words "or otherwise improves the same" found therein. It cannot be said, however, that the labor performed in this case in caring for the crops after they were seeded, in what appears to be the customary seasonal manner, "is of the same general character or in the same general class as labor in grading, clearing, or filling in land, and therefore, under the well known rule of *ejusdem generis,* is not within the statute." *Howe v. Myers,* 94 Wash. 563, 162 Pac. 1000, L. R. A. 1917D 349.

It is further claimed by the appellant that he was, nevertheless, entitled to a personal judgment against the owner of the real property for the balance due on his wages. But the testimony shows he was not employed by the owner of the property but by an independent contractor who alone had the right of employing and discharging all laborers, in the performance of a written contract with the owner to reduce the land, at a stipulated price per acre, from a wild state to one suitable for cultivation, in addition to the growing of a crop thereon for one year. It was to the independent contractor appellant looked for his pay, rather than the owner of the land, so far as personal liability was concerned.

Affirmed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15914. Department Two. January 20, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. ZACH McCHESNEY, *Appellant*.[1]

LARCENY (28) — EVIDENCE—WEIGHT AND SUFFICIENCY—IDENTITY. In a prosecution for larceny, the identification of decomposed heads of young cattle raises a question for the jury, where the cattle were pets with peculiar shaped heads and horns with marks thereon familiar to two witnesses recognizing them.

CRIMINAL LAW (356)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE —DILIGENCE. A new trial on account of newly discovered evidence should not be granted where the accused knew of the evidence before the trial and simply failed to find the witness and did not have any subpoena issued for him, since there was lack of diligence.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered November 29, 1919, upon a trial and conviction of grand larceny. Affirmed.

Edward A. Davis, for appellant.

E. M. Gibbons and *C. M. O'Brien*, for respondent.

MOUNT, J.—The appellant was convicted upon a charge of grand larceny. He has appealed from a judgment pronounced upon the verdict of the jury. Counsel for appellant insists that the court erred in not taking the case from the jury because the evidence is insufficient.

It appears that Mr. Schmidt, the prosecuting witness, was the owner of two two-year-old heifers which he had raised. These heifers were missed from their accustomed range in May of 1919. Mr. Schmidt, in searching for them two or three weeks later, found what he identified as the heads at a slaughter pen conducted by the appellant. Mr. Schmidt thereupon accused the appellant of slaughtering the cattle. At

[1]Reported in 195 Pac. 221.

the time the cattle disappeared, a black estray two-year-old heifer was with them. Mr. Schmidt testified that this estray had been with his cattle during the winter previous and that he had cut some notches on one of the horns of the estray; that he found the heads of all three of these cattle at the same time and place and that all these young cattle were very gentle and that he was familiar with the heads and horns of all of them; that, when he found the heads, they had been mutilated by being partly skinned and by having the ears cut off; that one of them had a white spot on the forehead, which white spot had been cut off; that the other, a jersey, had a peculiar shaped head and horns. These heads were somewhat decomposed, but Mr. Schmidt and Mrs. Sweigel, his housekeeper, positively identified the heads, notwithstanding their decomposed and mutilated condition, as the heads from the missing cattle owned by Mr. Schmidt. Mrs. Sweigel testified that she was very familiar with the cattle; that they were all pets; that she had seen them and petted them every day before they disappeared.

Appellant's counsel argues that it is unreasonable that these heads could be identified after they had been partly skinned and decomposed for two weeks or more. It may be that identification was more difficult for that reason, but when persons are familiar with cattle, as Mr. Schmidt and Mrs. Sweigel were with these where the cattle were pets and had peculiar shaped heads and horns with marks thereon, it is not unreasonable that a perfect identification might be made as was done in this case. At any rate, the question was clearly one for the jury.

Appellant also argues that the court erred in not granting the motion for a new trial on account of newly discovered evidence. The appellant made an

affidavit to the effect that a witness by the name of Allen helped to kill the cattle from which the heads were taken, and that Mr. Allen would testify that these cattle were branded with the letters O. C., the brand of Mr. Galloway, from whom the appellant claimed he purchased the cattle. He further stated in his affidavit that he had endeavored but failed to find this witness prior to the trial, but had now found his sister who knew the whereabouts of Mr. Allen and that he would be able to procure the witness at a new trial. This was not newly discovered evidence. Appellant knew of the witness and knew what he would testify. He simply failed to find the witness. If appellant regarded the witness as material, he had an opportunity to get a subpoena for him, which apparently was not done. We think sufficient diligence was not used to get the witness.

We find no error in the record. The judgment must therefore be affirmed.

Mitchell, Main, and Tolman, JJ., concur.

[No. 16137. Department One. January 21, 1921.]

JOHN I. DANIEL, *Petitioner*, v. GEORGE L. REID, *as Sheriff of Spokane County, Respondent.*[1]

APPEAL (241)—SUPERSEDEAS OR STAY—APPOINTMENT OF RECEIVER—EFFECT. The effect of an appeal from an order appointing a receiver, with supersedeas bond, is to take the property out of the possession of the court, and it is therefore subject to execution and sale under a judgment that was not superseded on appeal.

RECEIVERS (45) — TITLE TO PROPERTY — EFFECT OF APPOINTMENT. The appointment of a receiver to collect rents coming from a building does not put the building itself in *custodia legis*, so as to prevent the sheriff from levying an execution thereon to satisfy the judgment in the action in which the receiver was appointed.

SAME (45). A judgment debtor who opposed the appointment of a receiver to collect rents and appealed therefrom, giving a supersedeas bond, is not in a position to assert that the property is in *custodia legis*.

Application filed in the supreme court September 29, 1920, for a permanent injunction to restrain a sheriff's execution sale. Denied.

Cyrus Happy and *A. C. Moore*, for petitioner.

Joseph B. Lindsley and *W. C. Meyer*, for respondent.

BRIDGES, J.—In a suit other than this, instituted in the superior court for Spokane county, Hazel Daniel was the plaintiff and J. J. Daniel *et ux.* were defendants. It appears that the purposes of that action were to establish in that plaintiff an undivided ownership in lot 2, block 10, in the resurvey and addition to Spokane Falls (now Spokane), Washington, and for a money judgment against the defendants. It also appears that in that action the trial court found and adjudged that the plaintiff there was the owner of an undivided one-twelfth interest in the property mentioned, which

[1]Reported in 194 Pac. 979.

is commonly known as the Yale block, and gave a judgment in her favor against the defendants therein in excess of $24,000.

The judgment debtors have appealed to this court from that judgment, but have not given any supersedeas bond. We understand that this appeal is yet undecided here. The lower court, also in that action, appointed a receiver of the Yale block, or the rents, issues and profits therefrom. The receiver duly qualified, but before he had taken possession of the property or collected any rents, issues and profits, the defendants in that action appealed to this court from the order appointing the receiver, and gave a supersedeas bond on that appeal in the sum of $5,000. This appeal is, also, as we understand it, still pending here.

After the appeal from the order appointing the receiver, the judgment creditor caused an execution to be issued out of the cause mentioned, and directed to the sheriff of Spokane county, and by authority thereof the sheriff subsequently levied upon and advertised for sale all the right, title and interest of the judgment debtor in and to the property known as the Yale block. However, before any sale could be had, the judgment debtor commenced an action in the superior court at Spokane for the purpose of enjoining the sheriff from making sale under his execution and levy. The lower court refused to give any relief in that action. Thereafter the judgment debtor applied to this court for a temporary restraining and show cause order. This court issued a temporary restraining order and required the sheriff to show cause why a permanent injunction should not issue. The sheriff has answered the original application, and in this manner there is now before us the question whether the temporary restraining order heretofore issued by us shall be made permanent. In other words, the ques-

tion is whether the sheriff, under the circumstances detailed, is entitled to sell the property levied upon by him.

This case primarily involves the doctrine of property in *custodia legis,* and the effect on such property by the giving of a supersedeas bond in connection with the appeal from the order appointing the receiver.

The petitioner contends that the appointment and qualification of the receiver brought the property into the possession of the court, and since property in *custodia legis* may not be interfered with except upon order of the court, the sheriff has no right to sell the property under his writ of execution. The authorities cited by him hold that the giving of notice of appeal from the order appointing the receiver, and the supersedeas bond in connection therewith, stay the action of the court and receiver, and for the time being suspend the exercise of the functions of the receiver, and that the receiver, notwithstanding the appeal and supersedeas bond, is still the receiver and an officer of the court. 1 Clark, Receivers, § 882; High, Receivers (4th ed.), p. 220; 3 C. J. 1325; 23 Am. & Eng. Ency. Law (2d ed.), p. 1127; 17 Cyc. 980; *Texas v. Palmer,* 158 Fed. 705; *Stirling v. Seattle, R. & S. R. Co.,* 198 Fed. 913; *Hagan v. Lucas,* 10 Peters (U. S.) 400.

But these authorities do not go to the extent of holding that, under circumstances such as exist here, the property, after the appeal and the giving of the bond, still remains in the custody of the court, and we think that the effect of the giving of the bond was to take the property out of the possession of the court pending the appeal. The appeal and bond did more than merely stay the hand of the receiver—suspend his authority or power to act; it also authorized and empowered the appellant, who is the petitioner here, to obtain and

keep the actual physical possession of the property. If the bond, therefore, had this effect, how can it be said that the court had possession of the property? How can the property be rightfully in the possession of that appellant and still remain in *custodia legis?* As said in High, Receivers (4th ed.), p. 158:

"—And when the order appointing him (the receiver) is stayed by an appeal and *supersedeas,* the property will not be deemed in the custody of the law until actually reduced to possession by the receiver after the affirmance of his appointment on the appeal, until which time it remains in the custody of the original defendant, who is authorized to make necessary contracts for its preservation and for the protection of his rights."

To the same general effect, see *Cook v. Cole,* 55 Iowa 70, 7 N. W. 419; *Boston & M. C. C. etc. Co. v. Montana Ore Purch. Co.,* 27 Mont. 431, 71 Pac. 471. We are, therefore, of the opinion that the property is not, pending the appeal, in *custodia legis.*

The situation here is analogous to the situation where an appeal notice and stay bond have been given after the issuance and levy of an execution. Rem. Code, § 1727 provides:

"When an appeal bond is conditioned so as to effect a stay of proceedings if execution has issued the clerk shall on demand of the appellant, issue to the sheriff a certificate that proceedings have been stayed, which shall countermand the execution; and thereupon the sheriff shall release any property levied on and not already sold, and return the execution into court."

Ordinarily speaking, property levied on by the sheriff under a writ of execution is as much in *custodia legis* as property in the hands of a receiver, and if an appeal and accompanying supersedeas bond will absolutely take the property out of the hands of the court

when that court has obtained possession by virtue of an execution, a similar appeal bond should deprive the court of possession obtained by the appointment of a receiver.

But there is another reason why the sheriff should not be restrained from proceeding with his sale. Our previous discussion has been on the assumption that the receiver was appointed over, and with power to take possession of, the identical property which the sheriff is threatening to sell. But such is not the fact. By the order appointing the receiver, it is plain that the court intended that the extent of the powers of the receiver should be to collect the rents, issues and profits of the Yale block. That order, in part, reads as follows:

"Therefore it is hereby ordered that Alex J. Lindsay, of the city of Spokane in said county and state, be and he is hereby appointed receiver of the rents, issues and profits of said Yale block . . . . and that such receiver shall take possession and control of said building with the usual powers of a receiver, and collect and take possession of said rents, issues and profits, and generally to do such acts respecting the property as the court may authorize."

Manifestly, under this order, the receiver could do nothing more than collect the rents coming from the building; the title or ownership of the property was not affected, and the most the receiver could do would be to take such possession of the property as empowered him to collect the rents. The sheriff is advertising and threatening to sell "the right, title and interest of the defendant John J. Daniel," in the Yale block property. One who purchases at an execution sale does so subject to all rights and equities, and any person who purchases under this execution would take the title to the property subject to the right of the receiver to col-

lect and receive the rents, issues and profits, in the event this court should affirm his appointment.

While, ordinarily, ownership of real estate and the right to receive the rents, issues and profits therefrom are closely akin, yet in such a case as this they are easily separable. We conclude, therefore, that if it should be held that there is any property in *custodia legis,* it consists of rents, issues and profits and not the property itself, and that, consequently, the sheriff is not interfering with any property which might be in the possession of the court.

Another reason might be given why the writ issued by us should not be made permanent. If the property is in *custodia legis,* it was placed there upon the application and for the benefit of the judgment creditor who caused the execution to be issued and levied on the property in question. The petitioner here, the judgment debtor, has at all times opposed the appointment of the receiver and the taking possession of the property by the court, and has himself appealed from that order, and by virtue of his bond did everything he could possibly do to take or keep the property out of the possession of the court. He is not, therefore, in any position to claim the protection of the doctrine of *custodia legis.*

The restraining order heretofore made by us is dissolved.

PARKER, C. J., HOLCOMB, MACKINTOSH, and FULLERTON, JJ., concur.

[No. 15714. *En Banc.* January 21, 1921.]

C. P. FENTON *et al., Respondents,* v. JAMES WILLIAM POSTON *et al., Defendants,* MUTUAL UNION INSURANCE COMPANY, *Garnishee, Appellant.*[1]

INSURANCE (122)—LIABILITY FOR PERSONAL INJURIES OR DAMAGES INCURRED—INDEMNITY OR LIABILITY BOND. The bond of a compensated surety company was intended as a "liability" but not as an "indemnity" bond, where the bond was headed "liability bond" and was applied for as such, as provided by Rem. Code, § 5562-37, and the surety agreed to indemnify against loss from liability imposed by law upon the insured for damages "to any person" other than insured and their employees, and agreed to contest and defend any suits brought on the liability, and the bond contained no clause or any special conditions to the effect that no action shall lie thereon until the loss or expense shall have been sustained or paid (FULLERTON and MAIN, JJ., dissent).

SAME (122)—RISKS AND CAUSES OF LOSS—LAPSE OF POLICY—RELEASE. Where the premium in a liability bond was paid in advance at the time that a liability arose, the surety is liable although the liability was not established until after lapse of the policy, which expressly provided for a release only when the company is released from and has incurred no liability under the bond.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered September 2, 1919, in favor of the plaintiff in garnishment proceedings, after a trial to the court on the merits. Affirmed.

W. R. Crawford and *Remann & Gordon,* for appellant.

Browder Brown and *J. W. A. Nichols,* for respondents.

HOLCOMB, J.—The original action was brought by respondents, Fenton and wife, against defendants, Poston and Lamken and appellant, Mutual Union Insurance Company, to recover damages for injuries

[1]Reported in 195 Pac. 31.

received by Mrs. Fenton upon being run down by defendants' automobile in the city of Tacoma, on December 23, 1917. Plaintiffs alleged that defendants were operating this automobile for hire under a permit issued by the secretary of state, as provided by law, and for such purpose had filed with the secretary of state a bond with appellant as surety. Both defendants and appellant appeared by the same attorneys, defendants answering jointly, and appellant severally, the allegations of respondents' complaint. Thereafter the attorneys for defendants gave notice of withdrawal of their appearance for defendants in the cause.

Subsequently the case went to trial against defendants, but not against appellant, the action appearing to have been dismissed as to appellant; and, judgment for $3,500 having been rendered against defendants upon the verdict of a jury, respondents procured a writ of garnishment to be issued against appellant, asserting, in the affidavit filed to sustain the application for the writ of garnishment, that the judgment was unpaid and unsatisfied, and that appellant was indebted to defendants in the sum of $2,500, the amount of a bond issued by appellant to defendants under an application made October 29, 1917, the bond being in full force and effect at the time of the accident. Appellant made return to the writ, denying any indebtedness to the judgment debtors and averring that it had no property or effects belonging to them. In the garnishment proceedings, the court, sitting without a jury, gave judgment for respondents and against appellants for $2,400, the amount of the bond, less $100 representing unpaid premiums thereunder. From that judgment, the insurance company prosecuted this appeal.

The question presented by, and decisive of, the appeal, is whether the bond is one of indemnity or one of liability.

Although we held, in *Hadfield v. Lundin,* 98 Wash. 657, 168 Pac. 516, Ann. Cas. 1918C 942, that such a bond as was issued in this case did not comply with the statute, the company had, prior to the decision in that case, on October 29, 1917, issued and delivered to Poston and Lamken its bond, for a premium of $120, to be paid in monthly installments of $10 each, the first two of which were paid prior to the occurrence of the injuries to respondent Mrs. Fenton, and the installments payable subsequent thereto were not paid.

Poston and Lamken applied for the bond upon one of appellant's forms entitled, "Application for Liability Bond" in the "Penal sum of $2,500, as provided by Chapter 57, p. 227, of the Session Laws of 1915." The application commences with this language, which is also part of the printed form:

"The undersigned applicant, a member and policy holder of The Mutual Union Insurance Company, hereby applies to said company for a *liability* bond covering a *liability* within the corporate limits of the city of Tacoma on automobiles operated solely on what is known as the 'Army Post Route,' and to that end makes the following representations of fact . . ."

Language of the policy which is here material is as follows:

"The Mutual Union Insurance Company, in consideration of one hundred and twenty dollars ($120), and of the statements incorporated herein, which James William Poston and Louis Lamken make as warranties by the acceptance of this policy, and subject to the conditions hereinafter contained

"Does Hereby Agree

"1. To indemnify James William Poston and Louis Lamken, members of said company, against loss to

the amount of the penal sum of Twenty-five Hundred Dollars ($2,500), *from the liability imposed by law* upon said James William Poston and Louis Lamken *for damages on account of all injuries which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said James William Poston and Louis Lamken, their agents or employees, in the conduct of the business of transporting passengers for hire in a motor propelled vehicle, or in the operation of a motor propelled vehicle used in transporting passengers for hire over or along any public street, road or highway,* within the corporate limits of the city of Tacoma, Washington (except that it is understood and agreed that this bond or contract shall not apply to injuries or death suffered or alleged to have been suffered by the said James William Poston or Louis Lamken or any employee or agent of said James William Poston and Louis Lamken).

"2. *To contest claims and to defend suits, even if groundless, made or brought against said James William Poston and Louis Lamken on account of such bodily injury or death,* unless the company shall elect to settle such claims or suits.

"The Foregoing *Agreement* Is Subject to the Following Conditions:

"Limits of Liability:

"The Company's liability under this policy shall be limited in the following manner:

"A. That the liability of this Company shall be limited to the penal sum of Twenty-five Hundred Dollars ($2,500).

"B. That the *liability* of this Company shall be limited to *any damage caused to any person* by the following described motor propelled vehicle to-wit: Trade Name Packard Type of body Touring: Model 1911: Year Bought 1917: Factory No. : Motor No. 15083; State License No. 92952: City Vehicle No. 294: Seating Capacity Seven Passenger.

"Assignment:

"C. James William Poston and Louis Lamken can make an assignment of all their rights and in-

terests under the terms of this bond, or contract to the State of Washington, for and on behalf of any person that may be injured by them in the operation of said motor propelled vehicle used, as set out hereinabove in the transporting of passengers for hire. Such assignment when made will be duly accepted by the Company." [All italics ours]

The question as to the character of this bond is discussed in the briefs, and authorities are cited from this state and from other states. From our own state, appellant cites and relies upon the case of *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69. There the plaintiff sued the defendants, who were the contractors for certain iron-work on a building in Spokane, on account of injuries he had received by reason of defendants' negligence during the course of plaintiff's employment by other parties on the same building. The defendants in that case thereafter became insolvent and the judgment was not paid; and the plaintiff procured the issuance of a writ of garnishment against the appellant in the case, an insurance company which had theretofore issued a casualty policy to the defendants. This policy contained a condition as follows:

"D. No action shall lie against the company to recover for any loss . . . . or expense under this policy unless it shall be brought by the assured for loss . . . . *or expense actually sustained and paid in money by him after actual trial of the issue* . . . ."

We there held that the policy indemnified against loss and not against liability, stating that a compliance with the terms of the clause quoted was a condition precedent to any right of action on the policy, and that there was no privity between the insurer and the judgment creditor.

There was no such condition in the policy now under consideration. Here the company substantially *agreed,* by the terms of the policy, to indemnify Poston and Lamken against loss from liability imposed by law upon them for damages "to any person," other than the insured themselves and their employees, on account of injuries sustained by reason of any negligent act on the part of Poston and Lamken and their agents and employees, in the conduct of their business of transporting passengers for hire in a motor propelled vehicle over any public street in the city of Tacoma.

Two conditions of the policy limited the liability of the company thereunder to $2,500, and to damage caused by the car therein described. There were no conditions or provisions, other than these, in the policy issued to Poston and Lamken, intended to limit the liability of the company.

The case of *Maryland Casualty Co. v. Peppard,* 53 Okl. 515, 157 Pac. 106, L. R. A. 1916E 597, is a case strikingly similar to the one at bar. That action arose out of an employer's liability policy of insurance which indemnified the assured,

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee of the assured, ..."

The assured were engaged in certain construction work upon which one of their employees was killed by a fall from a scaffold. The widow of the deceased workman recovered a judgment against defendants which she was unable to collect, and she filed an affidavit of garnishment to the effect that the insurance company which had issued the policy was indebted to the defendants. The insurance company, as garnishee, contended that it was not indebted to the defendants, nor was it under liability to them; that the defendants,

being insolvent, had not paid out or lost anything by reason of the plaintiff's judgment against them; and that, if they, as the assured, had no right of action against the insurance company for the reason that the judgment had not been paid, consequently the plaintiff's action against the insurance company should fail. This contention was supported by the citation of numerous authorities from various states; and it is here significant that the case from our own state, *Ford v. Aetna Life Ins. Co., supra,* was one of the authorities cited. The supreme court of Oklahoma remarked that the policies in all of the cases cited contained the so-called "no action" clause, reading:

"No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue."

And the court also said that, if the policies involved in the *Peppard* case had contained the "no action" clause, doubtless the preponderance of authorities would be in support of the contention of the insurance company. The court further said:

"The other side of the proposition (holding such a contract of insurance to be one of liability, rather than one of indemnity), however, even where the policies contain the 'no action clause,' is not without respectable support. [Citing leading cases.]

"So we find that, whilst there is considerable conflict in the authorities as to the proper construction to be placed upon policies containing the 'no action' clause, the construction of policies in all other respects similar, but not containing the 'no action' clause, has not been, in so far as we have been informed, often under consideration by the courts.

"From an examination of the opinions in the cases sustaining what may be called the majority rule (favoring the 'indemnity' holding) we are unable to say to

what extent the courts rendering them were influenced by the 'no action' clause in reaching their conclusions. However, if any of these cases hold that the phrase 'indemnify against loss from the liability imposed by law upon the assured for damages on account of bodily injuries,' standing alone, literally means 'indemnity against loss from the liability imposed by law upon the assured for damages on account of bodily injuries which have been actually paid or extinguished by the assured,' we cannot agree with them. 'Loss from liability' literally means loss which arises immediately upon one becoming liable to another, not loss which arises immediately upon such liability being paid or extinguished. 'Liability' is defined in Webster's New International Dictionary as 'that which one is under obligation to pay, or for which one is liable.' In our judgment, it is faulty reasoning which leads to the conclusion that one can suffer no loss if he is unable to pay that which he is under obligation to pay. . . . In view of all the circumstances surrounding transactions of this kind, we are of the opinion that it is more in harmony with right, justice, and reason, and the rules governing the construction of contracts of insurance, which are always prepared by the insurer, to hold that the policies before us indemnify the assured against liability."

The court supported its holding by a number of cases: *Schambs v. Fidelity & Cas. Co. of New York,* 259 Fed. 55; *Patterson v. Adam,* 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184, and notes; *Blanton v. Kansas City Cotton Mills Co.,* 103 Kan. 118, 172 Pac. 987, L. R. A. 1918E 541.

The test as to whether this is a liability or an indemnity bond seems to be: If the intention of the parties thereto was to protect the assured from liability for damages, or to protect persons damaged by injuries occasioned by the assured as specified in the contract, when such liability should accrue and be imposed by law (as by a judgment of a competent court),

it is a liability bond; if, on the other hand, it is only to indemnify the assured against actual loss by them—that is, for reimbursement to them for moneys they had been obliged to pay and had paid, it would be an indemnity bond only, protecting only the assured. *Ford v. Aetna Life Ins. Co., supra; Davies v. Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A. 1916D 395; *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686. The last case above cited from our own court contains much reasoning apropos here.

Even though the bond involved herein did not comply with the requirements of Laws of 1915, p. 227, ch. 57, regulating the bonding and licensing of such public motor vehicles, it may still be a liability bond as contradistinguished from one of indemnity. In many, if not all, of the cases cited by appellant to establish this as an indemnity bond, the bonds contain some special condition, such as that numbered "D" in the *Ford v. Aetna Life Ins. Co.* case, *supra,* to the effect that no action shall lie against the insurer until the loss or expense shall have been actually sustained and paid in money. See, also, cases cited and quoted in above case. This bond contains no such special conditions. It is designated on its face by the party issuing it, "Liability Bond." The application was for a "Liability Bond." It was doubtless intended as such.

The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that, in case of ambiguity, it must be resolved against the one who prepared the instrument. The language in the document before us was not the choice of the assured. It was such as was intended to win for the operator of the motor car a permit to carry passengers, for hire, on the specified route, doubtless

under the belief that it would protect passengers and others under the provisions of Laws of 1915, p. 227, ch. 57.

The language of the surety engagement is somewhat ambiguous. It speaks of *indemnifying* the insured *against loss* to the amount of $2,500, "from liability imposed by law." But it also specifies: "B. That the liability of this company shall be limited to any damage caused to any person by the following described motor propelled vehicle. . . . ." It also made an apparent attempt to so far comply with the provisions of Laws of 1915, p. 227, ch. 57 (Rem. Code, § 5562-37), as was intended to be approved by the secretary of state, by a provision for assignment by the assured to the state for and on behalf of any person negligently injured. The objects and purposes of the defendants called for that kind of insurance.

If we may assume that the assured vehicle owners were insolvent and could not respond in damages at any time during the term of the policy, then they could never "suffer any loss" to any one injured by them, and the policy would never have any effect or benefit other than to give rise to the payment of premiums to be retained by the so-called insurer. We will not consider that such was the sole object of the parties. Policies such as this should not be so construed as to be a delusion either to those who bought them, or to those who in good faith rely upon them.

From the foregoing considerations, we conclude that this bond must be construed as one of liability for any liability imposed by law, and that respondent's judgment against defendants is clearly such a liability.

Appellant further contends that the bond in question had been canceled before any action was instituted and liability established by non-payment of premiums.

We cannot assent to that contention. The premium was, by agreement, to be paid in installments of ten dollars each, in advance, per month. The installment due November 29, 1917, was paid and the injury occurred on December 23, 1917, the third installment not then being due. The payment of November 29, *in advance,* continued the policy in force until December 29, 1917. The application for the bond conditioned the cancellation for non-payment of premiums as and when due "provided the company is released from and has incurred no liability under the bond, otherwise the remaining installments are due and payable." Under the last clause of the foregoing provision, the trial court offset the remainder of the unpaid premiums, to which respondents made no objection, and we do not think appellant can complain. Certainly a compensated guarantor will not be released from the guaranty after a liability covered by its engagement has accrued, although not established by law until after the lapse of the policy for non-payment of partial premiums.

The judgment is affirmed.

PARKER, C. J., MOUNT, MITCHELL, TOLMAN, MACKINTOSH, and BRIDGES, JJ., concur.

FULLERTON, J. (dissenting)—As stated in the majority opinion, the question for determination is whether the bond in controversy is one of indemnity or one of liability. The conclusion that it is one of liability is rested, if I have correctly gathered the purport of the opinion, on two separate grounds: first, that the bond was intended by the parties to be the statutory bond, prescribed by Laws of 1915, p. 227, ch. 57, and being so intended will be so held as between the insurer and the insured and between the insurer and a third person, notwithstanding it may be lacking

in some or in all of the essentials prescribed by the statute for such a bond; and second, that the language of the bond itself, properly interpreted, denominates the bond as one of liability rather than one of indemnity. With neither of these contentions can I agree.

The facts are simple. On and prior to the time of the execution of the bond in controversy, the defendants, Poston and Lamken, were operating an automobile stage over a route extending from a place near the business center of the city of Tacoma to the army post known as Camp Lewis, carrying passengers for hire. A part of the route passed over the streets of the city of Tacoma. That city is a city of the first class, and by the statute cited, it is made unlawful for any person to carry passengers for hire upon the streets of any city of the first class in a motor propelled vehicle without first obtaining a permit from the secretary of state so to do. To obtain the permit, the carrier is required by the statute cited (Laws of 1915, p. 228, ch. 57, § 2) to

"deposit and keep on file with the secretary of state a bond running to the State of Washington in the penal sum of twenty-five hundred dollars, with good and sufficient surety company licensed to do business in this state as surety to be approved by the secretary of state, conditioned for the faithful compliance by the principal of said bond with the provisions of this act and to pay all damages which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said principal, his agents or employes in the conduct of said business or in the operation of any motor propelled vehicle used in transporting passengers for hire over or along any public street, road or highway, and shall pay to the secretary of state a fee of five dollars . . . ."

Poston and Lamken were operating their automobile without a permit from the secretary of state. They

were unable to obtain a statutory bond. No licensed insurance company would then issue such a bond. This because, so it was stated in the argument at bar, of the decision of this court in *Salo v. Pacific Coast Casualty Co.*, 95 Wash. 109, 163 Pac. 384, L. R. A. 1917D 613. In this situation, they applied to the appellant company for a bond and that company issued to them the bond in suit. The appellant was not then a licensed company and could not issue the statutory bond had it so desired. It had theretofore applied for a license, it is true, but a license had been denied it by the state officer empowered to issue such licenses, and this court, in an opinion handed down less than two months prior to the issuance of this bond, had sustained the officer in his refusal. See *State ex rel. Mutual Union Ins. Co. v. Fishback*, 97 Wash. 565, 166 Pac. 799. Nor is there anything in the record that indicates that Poston and Lamken did not fully understand and appreciate the situation. There is no evidence that they applied to the secretary of state for a permit on the strength of the bond, and it is in evidence that they paid the deferred installments on the insurance premium as long as they continued to operate their stage. Nor is either Poston or Lamken here contending that the bond was the statutory bond. This contention is made on their behalf by the garnishee plaintiffs, who are neither parties nor privies to the contract, and whose sole interest in so doing is the hope that they may profit thereby.

But stress is laid on the language of the bond as tending to support the conclusion that the bond is a statutory bond. I cannot so read it. The bond (barring the italics, which are supplied by the majority) is correctly copied in the main opinion. It contains no reference to the statute. It does not run to the state of Washington. It contains no condition for the pay-

ment of damages to any person injured by the careless, negligent or unlawful act of the operators of the automobile. On the contrary, it purports on its face to be a contract between private persons, by which the one agrees to indemnify the other against loss from liability arising from certain defined causes.

Again, the opinion also contains statements from which it can be gathered that the majority conclude that it would operate as a fraud on the insured and on the injured person, if the bond is not construed as a statutory bond. In the opening paragraph of the opinion, it is pointed out that the plaintiffs alleged in their complaint that the defendants Poston and Lamken were operating the motor car under a permit issued by the secretary of state and had filed a bond with the secretary on which the appellant was surety, and later on it is said that "Policies such as this should not be so construed as to be a delusion either to those who bought them, or to those who in good faith rely upon them . . . ." But the majority should remember that allegations in a complaint, denied and unproven, avail nothing. It is perhaps unnecessary, but I may add that the plaintiffs sued the insurance company jointly with Poston and Lamken, and that this allegation was thought necessary to charge the former. Doubtless they thought the allegation true when it was inserted in the complaint, but afterwards, discovering their mistake, they consented to a dismissal of the action as against the company. The intimation that to construe the bond as other than the statutory bond would render it a "delusion" to the insured and the injured plaintiff is likewise unfounded. The insured, as I have hereinbefore pointed out, fully understood the nature of the bond and accepted it, so understanding it. There could be no fraud or deceit in its issu-

ance as to them. The injured plaintiff could in no manner be deceived or affected thereby. No contractual relation existed between her and Poston and Lamken at the time of the injury. She was not a passenger on the automobile. On the contrary, she was injured at about midnight, while walking in the roadway of a paved street, directly in the path of oncoming vehicles, although unobstructed walks in good condition, prepared especially for pedestrians, existed on each side of the street.

I cannot think, therefore, that there is any justification in the record for the statement of the majority, that the bond "was such as was intended to win for the operator of the motor car a permit to carry passengers, for hire, on a specified route," or the statement that "it also made an apparent attempt to so far comply with the provisions of chapter 57, Laws of 1915, as was intended to be approved by the secretary of state, ..." It seems to me that the bond was nothing more than a contract between private individuals, in no way subserving a public function, as does the statutory bond.

The second question, in my opinion, presents the debatable issue in the case; and on this I think the majority clearly wrong if our prior decisions in kindred cases are to be followed. Turning to the bond, it will be observed that the insurer agrees to "indemnify" the insured "against loss . . . . from the liability imposed by law" on the insured, arising from certain stated causes. The indemnity, it will be noticed, is not against "liability" arising from the stated causes, but is an indemnity against "loss from liability" so arising. It is this distinction that the majority seem to overlook, and it is the distinction which, in my opinion, renders the bond one of in-

demnity rather than one of liability. To prove this point, it would seem enough merely to cite the majority opinion at the place where the distinction between an indemnity and a liability bond is pointed out. Clearly the agreement here "is only to indemnify the assured against actual loss by them," and this by the terms of the definition given is an indemnity and not a liability bond. The adjudicated cases which I think support the contention are *Puget Sound Imp. Co. v. Frankfort etc. Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Sheard v. United States Fid. & Guar. Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; and *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

The last of these cases is cited by the majority and distinguished from the case in hand, because of the somewhat more definite language of the bond. While the distinction pointed out seems to me to be unfounded, I need not stop to discuss the reason for my conclusion. The second of the cited cases is equally emphatic in declaring the bond there in question to be an indemnity rather than a liability bond, and the bond contains none of the language thought to be distinguishing. The language of the obligatory clause of the bond was to "well and truly indemnify and save harmless the said obligee from any pecuniary loss, resulting from the breach of any of the terms, covenants, and conditions" of the contract for which the bond was given as a guaranty. We held this to be an indemnity and not a liability bond, using this language:

"The bond does not oblige the obligors to pay legal liabilities, but to indemnify the appellant (the obligee) for any pecuniary loss he may sustain from a breach of the contract; and in view of this provision, we agree with the appellant that it is an indemnity against liability for damages, and that the cause of action did

not accrue until the damages were judicially determined and actually paid."

Reference is made to the case of *Davies v. Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A. 1916D 395, with the remark that it "contains much reasoning apropos here." For my purposes I need but say that the case does not overrule the cases I have cited.

The bond, therefore, being one of indemnity against loss rather than one of indemnity against liability, there should be no recovery on the part of the garnishee plaintiffs. These plaintiffs, since they are not in privity of contract with either of the parties to the bond, cannot be substituted for the obligees therein. They can recover only in the case of an actual indebtedness owing by the insurance company to the obligees. This we held in *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash 173, 44 Pac. 153, 46 Pac. 238, where we said:

"The garnisher can get no better right to the debt garnished than his debtor has, and if the latter has no right in or to the debt, the former acquires none by his garnishment."

See, also, to the same effect *Ford v. Aetna Life Ins. Co., supra.*

There was no such indebtedness here existing. The obligees suffered no loss within the condition of the bond. They have neither paid nor been forced to pay the judgment against them.

The judgment should be reversed.

MAIN, J., concurs with FULLERTON, J.

[No. 16079. Department One. January 21, 1921.]

HENRY G. BOULTON, *Appellant*, v. THE CITY OF SEATTLE, *Respondent and Cross-Appellant*.[1]

STREET RAILWAYS (20, 30)—COLLISION WITH VEHICLES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The violation of a city ordinance does not make the driver of an auto truck in collision with a street car guilty of contributory negligence as a matter of law where it was not the proximate cause of the accident.

SAME. The contributory negligence of the driver of a truck in driving upon a street railway crossing is a question for the jury, where there was a dispute as to the speed of a street car approaching the crossing.

NEW TRIAL (21-24)—VERDICT CONTRARY TO EVIDENCE. The discretion of the trial court in granting a new trial upon conflicting evidence will not be disturbed on appeal where the facts were such that the trial court might feel that they did not justify the verdict.

Cross-appeals from a judgment of the superior court for King county, Ralston, J., entered April 23, 1920, upon granting defendant's motion for new trial after the verdict of a jury in favor of the plaintiff, in an action for damages sustained in a collision between a street car and an auto truck. Affirmed.

Piles & Halverstadt and *F. C. Reagan*, for appellant.

Walter F. Meier and *Ewing D. Colvin*, for respondent and cross-appellant.

HOLCOMB, J.—Plaintiff sued to recover damages for injuries to his automobile truck resulting when it collided with one of defendant's street cars. The jury returned a verdict for plaintiff. Defendant thereupon moved for judgment notwithstanding the verdict and for a new trial. The court denied the motion for judgment notwithstanding the verdict, and granted the motion for a new trial upon the stated ground that, in

[1]Reported in 195 Pac. 11.

his opinion, the jury "took up matters outside the record." Defendant, at the conclusion of plaintiff's case, moved for a nonsuit, and at the conclusion of all the evidence moved for a directed verdict; and, plaintiff having appealed from the order granting a new trial, defendant cross-appealed from the order denying the motion for judgment n.o.v. and denying the directed verdict and the nonsuit.

A summary of the facts out of which the action grew is as follows: On, and for several days prior to, April 22, 1919, appellant had been engaged in hauling dirt or gravel in his truck from a steam shovel at a point on Forty-fifth street, northeast, in the city of Seattle, for use in the construction of a bridge; and on the day in question, at about one o'clock in the afternoon, he was driving his truck north on the east side of Eleventh avenue, northeast, for another load of material. His practice had been, upon getting a load, to drive east on east Forty-fifth street to Eleventh avenue, thence south to the approach to the new bridge at Tenth avenue northeast. Returning in his empty truck for another load, he would go north on Eleventh avenue and west on east Forty-fifth street to the gravel pit. In making these trips, he passed, about every half hour, the street intersection where the accident occurred.

He testified that he had been accustomed, as he came up Eleventh avenue, to look between buildings across lots toward east Forty-fifth street, to see whether any street car or automobiles were coming; that, just before the accident occurred, he so looked and saw no car, he at that time being some distance down on Eleventh avenue; that, upon coming into the street intersection, he looked once more—this time west on east Forty-fifth street—and saw a street car,

as he says, about one hundred twenty-five or one hundred thirty feet away; that he was then about thirty feet from the point on the street railway tracks where his truck collided with the street car; that he assumed the car was coming at a normal and legal rate of speed and that he had sufficient time to cross in front of it, and so continued to cross east Forty-fifth street; that, when he was practically on the street car tracks and it was too late to stop, he saw the car approaching at an unusual rate of speed and almost upon him; that he "stepped on the gas," but the car struck the rear of his truck and turned it around ten or fifteen feet. He was then driving the truck at a speed of about ten miles an hour.

The legal rate of speed for the street car was twenty miles an hour. Appellant claims that it was traveling at a high or unusual rate of speed. Supporting this contention, appellant attempts to show the relative distance of the two vehicles from the point of collision, and having given the speed of the truck as ten miles an hour, points to the conclusion that the car must therefore have been traveling at a rate of speed in excess of that permitted by the city ordinance, and that such violation of the ordinance was the proximate cause of the accident. Upon appellant's assumption, the street car had about four times as great a distance to cover, in order to reach the point of collision, as did the truck, which was approaching at a speed of ten miles an hour. This suggests that the street car was approaching at a speed of about forty miles an hour. The street car had, however, come to a full stop at Tenth avenue, the first street west of Eleventh avenue; and when the motorman started it again, he testified that he "coasted" the distance from Tenth avenue to Eleventh avenue.

The motorman also testified that at no time did his car travel faster than eight or ten miles an hour in the block between Tenth and Eleventh avenues just before the collision; that he was twenty or thirty feet from the street intersection when he first saw appellant's truck approaching the tracks; that he rang his bell and slowed down the speed of his car to about six miles; that appellant slackened the speed of his truck, so he (the motorman) kept coming; that appellant then started to go a little faster, whereupon the motorman reversed his car in an effort to avoid the accident; that, after striking the truck, the street car traveled not more than four feet before coming to a complete stop. The conductor corroborated the motorman's testimony in practically every respect.

One Mr. Crim, a disinterested eye-witness of the accident, testified that, just prior thereto, the street car was traveling at about eight miles an hour; that the car was then about its own length (forty feet) from the point of collision, and the truck was not yet on the tracks, but approaching them from a point about on a line with the sidewalk. This witness, as well as the motorman and the conductor, testified that appellant "cut the corner," or failed to go around the center of the intersection of the two streets, in compliance with the city ordinance, as he should have done in making the turn into east Forty-fifth street where he intended to go.

Appellant admitted, upon cross-examination, that he could not accurately estimate the speed at which the car was traveling, but said that when he got into the street intersection he saw that the car was coming very fast; that he did not realize that it was coming so fast until he got very close to the car track and the motorman began to ring his bell; that he was observing the car all the time. He also testified that he could

have stopped his truck within its own length, or within fifteen feet. He was traveling up grade; the car was coming down grade. When appellant reached the sidewalk line, his truck was a distance of somewhat more than its length from the nearest rail of the track on which the car was approaching. If the street car were at that time as far away as appellant said he thought it was, it would, as has already been remarked, have been traveling more than forty miles an hour.

Cross-appellant cites the cases of *Bernhard v. Reeves,* 6 Wash. 424, 33 Pac. 873; *Larson v. American Bridge Co.,* 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Dyer v. Middle Kittitas Irr. Dist.,* 40 Wash. 238, 82 Pac. 301; *Roe v. Standard Furniture Co.,* 41 Wash. 546, 83 Pac. 1109; *Paich v. Northern Pac. R. Co.,* 82 Wash. 581, 144 Pac. 919; *Johnston v. Nichols,* 83 Wash. 394, 145 Pac. 417; *Devitt v. Puget Sound T., L. & P. Co.,* 106 Wash. 449, 180 Pac. 483; and *Lauridsen v. Bowden, Gazzam & Arnold,* 107 Wash. 310, 181 Pac. 885, as determining that, under such facts as are here shown, it should be held, as a matter of law, that appellant was guilty of such contributory negligence as to bar his recovery. Cross-appellant further contends that, under the facts, appellant violated the city ordinance in failing to go around the center of the intersection of the streets, and that such violation of positive law rendered him guilty of negligence *per se,* by reason of which he cannot recover.

There is nothing in the situation shown under the facts in this case that renders the violation of the traffic ordinance by appellant, in failing to round the center of the intersection of the streets, the proximate cause of the accident. This case is very similar in its facts to the recent case of *Nabours v. Seattle,* 113 Wash. 557, 194 Pac. 800, wherein we held that we could not say, as a matter of law, that plaintiff was

guilty of contributory negligence, but that the same was a question of fact for the jury.

Although the trial court was somewhat vague in the reason upon which he granted the new trial, we are of the opinion that, if he felt the facts which he had heard in the trial were such as to not justify the verdict returned by the jury, he could properly exercise his discretion in granting a new trial. Conceiving that that was what the trial court undoubtedly intended, and no more, and, since the questions of fact are very close, we think the trial court was justified in granting a new trial, and will affirm the order granting a new trial.

Affirmed.

PARKER, C. J., MACKINTOSH, and FULLERTON, JJ., concur.

[No. 15862. Department Two. January 21, 1921.]

J. F. JOYCE, *on behalf of himself and others, Plaintiff*, v. GEORGE C. CONGDON *et al., Defendants.*[1]

CORPORATIONS (87)—STOCKHOLDERS—SUING ON BEHALF OF CORPORATION. A minority stockholder may maintain an action in behalf of himself and others similarly situated where the majority stockholders acquired stock and paid for it out of the funds of the company.

SAME (87-90) — SUIT ON BEHALF OF CORPORATION — JUDGMENT. Where plaintiff stockholder is the only one who will be benefited by his attack upon the corporation paying for stock distributed to majority stockholders, judgment was properly entered in his favor individually for the amount of his loss.

SAME (87)—STOCKHOLDERS—RIGHT TO SUE ON BEHALF OF CORPORATION. One purchasing stock from wrongdoers who acquired the stock through use of funds of the corporation, knowing of the wrong, cannot, as a minority stockholder, complain of the manner in which it was acquired.

[1]Reported in 195 Pac. 29.

SAME (87-90)—SUIT ON BEHALF OF CORPORATION—ATTORNEY'S FEES. Expenses and attorney's fees should not be allowed a minority stockholder who brought an action attacking the use of corporate funds in the acquisition of stock by majority stockholders, where the recovery was for the benefit of the plaintiff individually and not for the corporation.

SAME (29-69)—CAPITAL STOCK—INCREASE—STOCK DIVIDENDS. Majority stockholders who negotiated for and purchased outstanding stock and paid for it out of the funds of the corporation cannot sustain the transaction as a stock dividend, where it was not newly issued stock, and where there was no showing of a financial status authorizing a dividend equal to the value of the stock.

Cross-appeals from a judgment of the superior court for King county, French, J., entered March 8, 1920, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

W. H. Bolen, for appellant.

G. E. de Steiguer, for respondents and cross-appellants.

MAIN, J.—The plaintiff, a stockholder in the Copeland Shirt Company, a corporation, brought this action on behalf of himself and other stockholders alleged to be similarly situated. The individual defendants were officers and trustees of the corporation, and together owned a majority of the issued capital stock thereof. The corporation was also made a party defendant. The purpose of the action was to cause to be cancelled certain stock which had been issued to the individual defendants, and which had been paid for out of the funds of the corporation or, in the alternative, require them to account to the corporation for the value thereof. The action was sought to be maintained for the benefit of the corporation. The trial resulted in a judgment denying any recovery for the benefit of the corporation and giving the plaintiff judgment individually for the sum of fifteen dollars. From this

judgment, the plaintiff appeals, and the defendants prosecute a cross-appeal. The parties will be referred to as plaintiff and defendant.

In the year 1916, the Copeland Shirt Company was doing business in the city of Seattle. Of the issued stock, two shares were owned, one share each, by C. O. Rinehard and J. F. Joyce, the plaintiff; eighty-five shares by the defendant Congdon; ninety-two shares by the defendant Underhill; and one hundred shares by E. P. Fick. In addition to this, there were one hundred and fifty shares which are referred to as the Rinehard-Wooster stock, having been purchased by Rinehard but pledged as security to Wooster. In July of the year mentioned, certain of the majority stockholders negotiated for the purchase of Rinehard-Wooster stock and it was acquired for the sum of five hundred dollars. In payment thereof, a credit of fifty dollars was given upon the books of the company and four hundred and fifty borrowed from a bank upon a note signed by the corporation and endorsed by the stockholders. The note was subsequently paid out of the funds of the corporation. After the stock had been acquired, the certificate therefor was cancelled and the one hundred and fifty shares were re-issued to Fick, Underhill and Congdon in proportion to their holdings in the company.

Sometime during the year 1918, one F. W. Franck purchased all the stock then owned by Fick. This purchase included the stock which had been distributed to Fick out of the one hundred and fifty shares mentioned. Whether Franck at this time knew that a part of the stock which he was purchasing had been paid for by funds of the company, is a disputed question of fact. Without reviewing the evidence, it may be said that, in our opinion, it preponderates in favor of the contention that he knew the source of the stock and how it

was paid for. Franck, after becoming a stockholder, was employed by the company until sometime before this action was instituted. After his connection with the company as an employee ceased, he sought advice to know whether he could maintain an action against the other stockholders to require them to return to the company the stock which they held which had been paid for out of the funds of the company and he was advised that he could not maintain such an action. Subsequently the action was instituted by Joyce, as above stated, and at the time it was begun he owned six shares of the stock. The other stockholders were Franck, Underhill and Congdon and two others owning one share each. The complaint charges that these two stockholders are in collusion with the defendants Congdon and Underhill. From this it appears that the only other stockholder for whose benefit the plaintiff could be prosecuting the action, other than himself, would be Franck.

Little need be said upon the manner in which the one hundred and fifty shares of stock were acquired, paid for and distributed to the other stockholders. As against the will of the minority stockholders, such a transaction was obviously illegal. The stock cannot be acquired, paid for by the funds of the company, and distributed to the majority stockholders. The right of a minority stockholder to attack such a transaction in behalf of himself and other stockholders similarly situated is plain. *Von Arnim v. American Tubeworks,* 188 Mass. 515, 74 N. E. 680.

The plaintiff complains of the fact that the recovery in this case was to him individually, and not to the corporation. It is true that the general rule is that, in actions of this character, the amount of the recovery will go to the corporation and not to the individual mi-

nority stockholders. This rule, however, is not universal. If, in awarding a recovery to a corporation, it would result in a stockholder's receiving a portion thereof to which he was not entitled, then a court of equity will look beyond the corporation and decree the recovery to the individual stockholders entitled thereto. *Brown v. DeYoung,* 167 Ill. 549, 47 N. E. 863.

In this case Franck, having purchased his stock from one of the wrongdoers, could not complain of the manner in which it was acquired by such wrongdoers, and had no right as a minority stockholder to maintain an action. *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 93 N. W. 1024, 108 Am. St. 716, 60 L. R. A. 927. In that case the authorities are fully cited and reviewed and the citations need not be here repeated. If the stock were cancelled and returned to the corporation, or if the individual defendants were required to account for the value thereof, the result would be that Franck, the party who had no right to complain and who could not maintain the action, would be benefited thereby because, as a stockholder, he would receive his resultant pro rata benefit. There being no other stockholder on whose behalf the action could be maintained by the plaintiff other than himself, the trial court properly awarded him an individual judgment for the sum which would represent his loss in the transaction.

The next question upon the plaintiff's appeal is whether the court erred in not allowing him expenses and attorney's fees in addition to those allowed by statute. The recovery in this case not being for the benefit of the corporation but for the benefit of the plaintiff individually, expenses and attorney's fees other than those fixed by the statute were properly disallowed. *Boothe v. Simmit Coal Min. Co.,* 72 Wash. 679, 131 Pac. 252.

Upon the cross-appeal of the defendants, it is sought to sustain the transaction in dividing the one hundred and fifty shares of stock in that the distribution thereof was in the nature of a stock dividend. To this contention there are two answers: A stock dividend involves the creation and issuing of new stock. 7 R. C. L. 288. The stock divided and distributed was not new stock but stock which had once been subscribed for and was acquired in the manner above set out. In addition to this, there is no showing of the financial status of the company which would authorize a dividend in a sum equal to the value of the stock. Such a dividend may be declared when the corporation is possessed of property exceeding its liabilities in an amount equal to its capital stock, including the increased stock which is distributed as a dividend. *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 154 Pac. 182.

Both parties having appealed, and neither having prevailed, no costs will be allowed in this court.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 16242. Department Two. January 21, 1921.]

In the Matter of the Application of M. E. BISHOP *for a Writ of Habeas Corpus.*[1]

HABEAS CORPUS (5, 6)—NATURE AND GROUNDS OF REMEDY—PROCEEDINGS REVIEWABLE—COMMITMENT FOR CONTEMPT—VALIDITY. An order committing petitioner to the custody of the sheriff until such time as he shall comply with the order of court requiring the payment of alimony, is in effect a commitment, and if valid on its face, the petitioner cannot be discharged from custody on a writ of habeas corpus.

Application filed in the supreme court December 1, 1920, for a writ of *habeas corpus* to obtain petitioner's release from a commitment in contempt proceedings. Denied.

E. C. Dailey and *A. E. Dailey,* for petitioner.

MAIN, J.—This is a *habeas corpus* proceeding. The petitioner was adjudged guilty of contempt by the superior court of Skagit county for failure to pay alimony to his divorced wife, and was ordered committed to the custody of the sheriff of that county until such time that he should comply with the order of the court and pay the alimony. This order was entered on the 13th day of September, 1920, and no appeal was prosecuted therefrom. On December 1, 1920, upon application to this court, a writ of *habeas corpus* was issued, directed to the sheriff of Skagit county, and that officer made return to the writ. In the petition for the writ, it is claimed that the petitioner is restrained of his liberty unlawfully, first, because he is unable to pay the alimony; and second, because he is not being held by the sheriff under a legal commitment.

As to petitioner's ability to pay the alimony, it will be assumed, but not decided, that that question may be

[1]Reported in 194 Pac. 971.

inquired into in this proceeding. There is, however, no showing in the record now before us that would justify holding that the failure to pay the alimony was due to inability.

As to the commitment, the order entered by the superior court, after a hearing where the petitioner appeared in response to a show cause order, recited that,

"The defendant, M. E. Bishop, having appeared in person on this date and stated to the Court his reasons for his failure to pay the alimony as aforesaid, and the court deeming his reasons therefor insufficient, it is therefore, here now ordered, That the defendant be and he is hereby committed to the custody of George Reay, sheriff of Skagit county, until such time as he shall comply with the orders of this court, heretofore entered herein."

It is under this order that the petitioner is being held. It is, in effect, a commitment, and is valid on its face, the record showing, at the time the petitioner was adjudged guilty of contempt and ordered committed to the custody of the sheriff, the court had jurisdiction of his person and of the subject-matter. The case of *In re Cave*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736, has been referred to, but there is nothing in that opinion that would sustain the claimed right of the petitioner to be discharged in this case upon a writ of *habeas corpus*.

The petitioner, M. E. Bishop, will be remanded to the custody of the sheriff of Skagit county to be held by him under the order of the court above referred to, and it is so ordered.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 16055. Department Two. January 21, 1921.]

N. C. LARSEN, *Respondent*, v. J. A. BETCHER, *Appellant*.[1]

BILLS AND NOTES (124) EVIDENCE (150)—PAROL—EVIDENCE—ADMISSIBILITY TO VARY CONTRACT. A promissory note may not be varied by parol evidence of an oral agreement that it would be held by the payee until due unless it was found necessary to use it as collateral.

SAME (64-1, 127)—BONA FIDE PURCHASER—NOTICE OF INFIRMITY—FRAUD. An oral agreement to hold a note until it was due unless it was found necessary to use it as collateral is not evidence of any fraud in the inception of the note, nor notice of an infirmity as defined by Rem. Code, § 3447.

SAME (64, 122)—BONA FIDE PURCHASER—GOOD FAITH—NOTICE—PRESUMPTIONS. That a note had its inception in a stock transaction is not sufficient notice to put a purchaser on notice of any infirmity, and unless bad faith, as defined by Rem. Code, § 3447, is shown or can be inferred from the facts, good faith is presumed.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered December 24, 1919, upon the verdict rendered in favor of the plaintiff by direction of the court, in an action on a note, after trial on the merits. Affirmed.

E. B. Quackenbush, for appellant.

White & Randall (*F. B. Danskin*, of counsel), for respondent.

TOLMAN, J.—On February 2, 1918, respondent, who is a farmer and merchant doing business at Farmer, in Douglas county, in this state, purchased from one L. B. Simons the note involved in this action, which was dated January 19, 1918, due one year after date, for the sum of $1,500, with interest at the rate of eight per cent, payable at maturity, paying therefor $1,375. Respondent knew, or might have known, that Simons

[1]Reported in 195 Pac. 27.

was a stock salesman plying his calling among the farmers of that vicinity and he had theretofore been solicited by Simons to purchase such stock, and had refused to consider the matter, and knew nothing whatever of the merits or value of the stock. Being approached upon the matter of the purchase of the note, he first gave an evasive answer, but finally, knowing the maker of the note, and believing him to be financially responsible, he agreed to meet Simons in Waterville where the note was submitted to two bankers, one of whom pronounced the endorsement of one Miller, which was already on the note, to be genuine, and both gave their opinion to the effect that the note was good. Thereupon respondent purchased the note and gave Simons a check for the purchase price. The stock afterwards proved to be worthless, but even appellant Betcher was not aware of that fact until May or June following.

The case was tried to a jury, and at the close of all the testimony, the trial court instructed the jury to render a verdict in favor of the plaintiff, respondent here, for the amount of the note, with interest. From a judgment on the directed verdict, this appeal is prosecuted.

It is appellant's contention that the facts and circumstances under which respondent purchased the note were such as required the submission to the jury of the question of his good faith. Our negotiable instrument statute, Rem. Code, § 3443, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face;

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"3. That he took it in good faith and for value;

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

And it appears to be admitted that the facts were such as to warrant the court in determining, as a matter of law, that all of these conditions existed, except the one of good faith, and there being evidence offered tending to show that the execution of the note was fraudulently procured, appellant urges that, under Rem. Code, § 3450, the burden was on the respondent to establish all of the elements necessary to constitute a holder in due course. Assuming, for present purposes, but not deciding, that appellant correctly construes this latter section of the statute, we must also bear in mind Rem. Code, § 3447, which reads:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Appellant's argument is based upon his cross-examination of respondent, from which it appears that, although Simons had solicited him to buy stock, he had refused without any investigation, because it was his fixed purpose not to buy that of which he knew nothing; that he had reason to suppose that Simons was endeavoring to sell stock of some kind to farmers generally and that this note had been given in such a transaction, and that he did not inquire personally of appellant Betcher before purchasing the note; though if he had done so he could have learned only that Simons had orally agreed with Betcher that the note was to be sent to the company whose stock Betcher was purchasing, and would be held by the company until due unless it was found necessary to use it as collat-

eral. Such an oral agreement cannot be shown to vary the terms of a written instrument (*Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. 889); and would not, if proven, be any evidence of fraud in the inception of the note.

Since our statute provides, as already quoted, that to constitute notice of an infirmity in the title of the person negotiating the note, the person buying it must have had knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounted to bad faith, it is apparent that the purchaser of a note, under the statute, acts either in good faith or in bad faith; and unless bad faith, as defined by the statute, is shown, or can be inferred from the facts or circumstances, good faith is presumed.

In the final analysis, the question really urged which we are attempting to discuss, is, in effect, that, as the note arose out of a stock transaction, the jury should have been permitted to find that one knowing, or having reason to believe that a note was so given, could not purchase it in good faith. It may be admitted that farmers and others are all too often fleeced by the sale to them of worthless stock, and the legislature might well take steps to put a stop to this crying evil, but until the legislature does act, we cannot say from our judicial knowledge that all stock transfers are fraudulent, or even that a considerable percentage are so, and much as we would like to protect all who are victimized, we cannot do so at the expense of the innocent, or in defiance of well-established law. Neither can a jury be permitted to draw the inference that one purchasing negotiable paper does so in bad faith merely because he knows the paper had its inception in the purchase of corporate stock.

In *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907, this court held that the fact that a note had its inception in

a stock transaction was not sufficient notice to put a purchaser on notice, and in *Gray v. Boyle,* 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042, the rule by which the good faith of a holder of negotiable paper is determined is quoted from Crawford's Annotated Negotiable Instrument Law (3d ed.), p. 68, as follows:

"The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide,* his title, according to settled doctrines, will prevail."

This rule we have consistently followed. *Scandinavian-American Bank v. Johnston,* 63 Wash. 187, 115 Pac. 102; *Fisk Rubber Co. v. Pinkey,* 100 Wash. 220, 170 Pac. 581. The authorities upon which appellant relies are all distinguishable upon the facts. Since the evidence discloses no fact or circumstance from which the jury would be justified in drawing the conclusion that respondent acted in bad faith, the court did not err in directing the verdict.

Error is assigned also upon the limiting of the appellant's cross-examination of respondent. We have carefully studied the record and cannot find that there was any error in this respect.

The judgment is affirmed.

HOLCOMB, MITCHELL, MOUNT, and MAIN, JJ., concur.

[No. 16071. Department One. January 24, 1921.]

H. G. BAYERS, *Respondent*, v. A. E. BARRY *et al.*, *Appellants*.[1]

EVIDENCE (50)—RELEVANCY—MATTERS EXPLANATORY OF FACTS IN EVIDENCE. It is competent for a witness, in repeating a conversation concerning the transaction in dispute, to state that, as reasons for not advancing certain money, he said he had a wife and six children to support.

APPEAL (456)—REVIEW—HARMLESS ERROR—ERROR CURED BY WITHDRAWAL. Error cannot be predicated in allowing certain testimony to go to the jury, where it was subsequently withdrawn and the jury admonished not to consider it, unless it is affirmatively shown that the admonitions failed of their purpose.

SAME (449)—REVIEW—HARMLESS ERROR—EVIDENCE—PREJUDICIAL EFFECT. In an action to recover advances made for certain expenditures, including a lease of premises, it is not prejudicial error to admit in evidence a lease which defendants claimed was not what had been agreed upon.

TRIAL (35)—OBJECTIONS—SCOPE AND SUFFICIENCY. An objection to letters as self-serving is unavailing where parts of the letters were proper and the objection was not confined to the objectionable parts.

EVIDENCE (175)—PAROL TO EXPLAIN WRITING. Where a telegram between the parties is perfectly plain and unambiguous, it is not competent for the sender to explain what he meant by the telegram.

CONTRACTS (67)—EVIDENCE (168)—PRIOR ORAL AGREEMENTS COLLATERAL TO WRITTEN CONTRACT. In an action upon contracts, where there was nothing inconsistent between written and oral agreements between the parties and their subject-matter was not the same, it is proper to refuse a requested instruction to the effect that there could be no recovery unless the oral agreement was subsequent to the writing.

TRIAL (102)—INSTRUCTIONS—REQUESTS—PARTLY ERRONEOUS. It is not error to refuse a requested instruction which was in part bad, although parts of it could have been properly given.

SAME (101)—INSTRUCTIONS—ALREADY GIVEN. Error cannot be predicated upon the refusal of a requested instruction which was sufficiently covered in the general charge.

[1]Reported in 194 Pac. 993.

Appeal from a judgment of the superior court for King county, Jurey, J., entered April 7, 1920, upon the verdict of a jury, rendered in favor of the plaintiff, in an action upon a contract. Affirmed.

Kerr & McCord and *Stephen V. Carey,* for appellants.

James R. Chambers, for respondent.

Bridges, J.—The respondent, Bayers, during the year 1919 was, and for many years prior thereto had been, a resident of Juneau, Alaska. Much of his time had been spent in the fishing industry. The appellants, Barry and Groll, were fish-cannery men, residing in the state of Washington. Prior to February, 1919, the respondent had made certain preparations for the building and operation of a fish cannery at Douglas, Alaska. He had made arrangements for the lease of a suitable wharf upon which the cannery might be built and operated, and he had a boat and large scow suitable for the fishing industry, and he also owned certain fish trap locations which had not been improved. He had made other tentative fishing arrangements. He found himself unable to carry out his cannery plans for want of sufficient funds, and in February of 1919, he came to Seattle for the purpose of interesting some person in his project. Through a mutual friend, he met the appellants in Seattle, and on various occasions conferred with them concerning his proposition. On the 20th of February he, as the party of the first part, and appellants, as parties of the second part, executed a written instrument as follows:

"Party of the first part hereto agrees to enter into a corporation for the operation of a cannery at Douglas, Alaska, to be known as the Douglas Packing Company, and further agrees to transfer a certain lease on

building and wharf at Douglas, Alaska. Two trap locations, one boat in good running order named the Electro, and one scow in good condition, and in payment for such equipment and lease is to receive one-third of the issued capital stock of said company.

"Parties of the second part agree to furnish the necessary machinery and the necessary money to install the machinery and start the operation of the packing company at the location indicated, for which machinery and money, said second parties are to receive two-thirds of the capital stock of the company, one-third to be held for the San Juan Canning Company, a corporation of Friday Harbor, Washington, the other third to be held by said second party.

"The corporation is to have a board of three trustees, of which board the contracting parties are to be the active members."

Respondent contends that, at or about the time of the making of this written contract, the appellants authorized him to return at once to Alaska and obtain a lease upon the Douglas wharf, and get the wharf ready to receive the machinery which was to be shipped thence by the appellants from their cannery at Friday Harbor, and that he should also engage fishing boats and fishing crews for the coming fishing season, and generally to get things in order so that the cannery might be operated without delay. Respondent further contends that the appellants agreed to pay all of the expenses in connection with the matters just recited, and that they requested him to make these various repairs and preparations out of his own money, but on their account, and that within a very short time, they would reimburse him and place all necessary monies to his credit. The respondent further contends that, in compliance with this arrangement, he at once returned to Alaska and expended various sums of money in repairing the Douglas wharf and putting it in condition to receive the canning machinery, and in obtaining and re-

pairing various fishing boats belonging to fishermen and in other ways, and in this manner he had spent all of his own means for the account of the appellants, in excess of $6,000, and that, after these expenditures had been made, the appellants refused to reimburse him therefor. He further contends that he was damaged in the sum of $1,500 on account of loss of his own time in making preparations to carry out the agreement which he alleges was entered into with the appellants.

The appellants, both in pleading and in testimony, deny substantially all of the material allegations of the complaint and of respondent's testimony, except they admit that the written contract had been entered into. There was a trial before a jury which returned a verdict in the sum of $6,272.31. The trial court informed the jury that the respondent was not entitled to recover anything for his services and that feature was taken from the jury. Judgment was entered on the verdict, and after a motion for new trial was denied, the defendants appealed to this court, where they assign many errors, which we will notice in the order of their argument.

(1) The respondent, while on the witness stand, was undertaking to give the various conversations he had with the appellants concerning his fishing proposition, and stated that they had asked him if he would not, for the time being, expend his own money on their account, and that, in this connection, he told them he could not afford to take any chances, and that he had a "wife and six small children to maintain," and that he would go up there and do the best he could until they sent him money. Appellants objected to the witness testifying to the fact that he had a wife and children, for the reason that it was immaterial and had a tendency to prejudice the jury in his favor. We cannot see

any merit in this claim of error. The respondent was but repeating a conversation which he claimed to have had with the appellants concerning this business proposition, and was merely explaining to them that he would have some difficulty in advancing money on their account because he had his wife and children to support. What he said in this regard was but a part of the conversation which he was trying to detail, and as such was admissible.

(2) The respondent offered to prove that he had spent much of his time in complying with the requests of the appellants, and that because they had refused to carry out their portion of the agreement his time was lost, which he valued at $1,500. The appellants objected to this class of testimony, contending that there could not be any recovery in this action for loss of time, and citing two decisions from this court. The noon hour having arrived, the court said he would examine the decisions before court reconvened. It appears, however, that the court neglected to examine the decisions and the testimony objected to went before the jury. Later in the afternoon, the court read the decisions cited to him and then announced that he thought his ruling had been wrong and that he would strike the testimony with reference to the $1,500. He then called the jury in and specifically instructed it that he had changed his ruling in this regard and withdrew from its consideration this $1,500 item and told the jury not to consider it. The appellants, however, now contend that this testimony had been permitted to go to the jury through no fault of theirs, and that it was very prejudicial to them, and by receiving the testimony the damage was done and that the court could not correct the mistake he had made, by admonishing the jury.

Certainly, there cannot be any such error in this regard as to require the case to be reversed. In the haste

and heat of the trial of cases, it is to be expected that attorneys will at times say objectionable things, and the court make erroneous rulings. If all these errors are to be considered prejudicial and that the court is powerless to cure or correct them, then we will be constantly reversing cases and there will be no end to law suits. We, as well as all other courts, have always held that errors of this character may be corrected by proper admonitions or instructions from the court to the jury, unless it is affirmatively shown or we are otherwise convinced that the admonitions and instructions have failed in their purpose. It seems unnecessary to further discuss the matter than to cite some of our decisions in support of the position we are taking: *State v. Boyce,* 24 Wash. 514, 64 Pac. 719; *State v. Hawkins,* 27 Wash. 375, 67 Pac. 814; *Bunck v. McAulay,* 84 Wash. 473, 147 Pac. 33; *Yakima Valley Bank v. McAllister,* 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A. (N. S.) 1075; *Smith v. Buckman,* 22 Wash. 299, 61 Pac. 31.

(3) After the respondent had returned to Alaska, he procured a lease to the wharf on which the cannery was to be erected, but this lease did not, in all respects, comply with the oral agreement with reference thereto. This lease had previously been sent by the respondent to the appellants, who, after retaining it for some time, returned it without their signatures. The lease was introduced in evidence together with the bill of the lessor for six months' rent. The appellants contend that the lease was improperly received in evidence and that there can be no recovery for the six months' rental because the lease was not what had been agreed upon. We think, however, that these objections are not well taken. Even if it should be conceded that the lease was not what had been agreed upon, still the respondent,

acting for the appellants, according to his contention, had actually occupied the leased premises, and regardless of the form of the lease, would be required to pay a reasonable rent thereon. Such being the case, we can see no prejudicial error in the admission of the lease in evidence, nor can we see any reason why the respondent should not be entitled to recover the rental, provided he proved his case satisfactorily to the jury.

(4) After respondent had returned to Alaska, there were a number of telegrams and letters exchanged between him and the appellants. These were put in evidence and among the rest was a letter from respondent to Mr. Groll, dated June 2, 1919, which was in answer to a letter which Mr. Groll had last written to him, wherein the appellants informed the respondent that they would not be able to carry out their part of the program. The appellants made strenuous objection to the introduction of respondent's letter of June 2, on the ground that it was self-serving, immaterial and prejudicial. Unquestionably, parts of this letter are open to the objections made to it, but other parts of it are entirely proper to have been received in evidence. Had appellants asked the court to keep from the jury such portions of the letter as were objectionable, it would doubtless have been the court's duty to have complied therewith. This request, however, the appellants did not make; they objected to the introduction of the letter as a whole and since parts of it were properly receivable, the appellants cannot now complain that the entire letter was received.

(5) The respondent offered in evidence a telegram dated March 27, 1919, from the appellant, Mr. Groll, to respondent, reading as follows: "Have you lease on building. Have you made any repairs on dock. I expect to leave on the seventh. Answer." When Mr.

Groll was on the witness stand, his counsel sought to have him explain what he meant by this telegram. He claimed that previous thereto he had sent a letter to the respondent warning him not to incur any expense on account of the appellants, and he sought to testify that, by this telegram, he wanted to learn whether that letter was being complied with. On the contrary, the respondent denied ever having received the letter last mentioned, but contended that other and later letters and telegrams from the appellants confirmed his authority to proceed at their expense. The court refused to allow Mr. Groll to make his desired explanation, and we think this ruling was right. The wording of the telegram is perfectly plain and it was for the jury, under all the circumstances, to determine the construction it should be given.

(6) Appellants complain of the action of the court in refusing to give their requested instruction as follows:

"You are instructed that the plaintiff cannot recover in this action upon the written instrument of February 20, 1919, in evidence and cannot recover at all unless you are satisfied from a preponderance of the evidence that a subsequent oral agreement was made between the parties, whereby the defendants authorized the plaintiff to make expenditures for their account. As to whether or not such a subsequent oral agreement was in fact made you should consider all the testimony in the light of the circumstances surrounding the parties at the time, the purpose of the alleged contract and the conduct of the parties before the litigation arose, and from all of the evidence determine as to the probability of such a contract having been entered into. If you believe that the oral contract alleged to have been made was of such a character that reasonable business men would not have made it under the circumstances, shown in this case, you have a right and it is your duty to take that fact into consideration in making up your mind whether such an oral contract ever was agreed to by the defendants."

The substance, of this request, is that there can be no recovery unless the oral agreement between the parties was made subsequent to the written agreement, and in determining whether or not the oral agreement was made at all, the jury might take into consideration all of the surrounding circumstances touching the probability of such an agreement being made, and that if they believed that the agreement was such that reasonable business men would not have made it, then that fact should be taken into consideration in determining whether or not the agreement had, in fact, been made. We think the court properly refused to give this requested instruction. It was immaterial whether the oral agreement was made before or after the written contract was entered into. The written contract was with reference to the organization of a corporation and what each party would put into that corporation, and the amount of stock he or they should receive therefor. It did not pretend to cover the features of the oral contract as testified to by the respondent. That contract was merely that the respondent was to go to Alaska and make preparations for the coming fishing season, expend such monies as might be proper in that connection, and charge the same to the account of the appellants. There is nothing inconsistent between the oral and written agreements. The subject-matter of the alleged oral agreement was not the same as that of the written contract. Such being the case, the oral contract was enforcible, whether made before, contemporaneous with, or after the written contract. There are certain features of this requested instruction which would have been proper for the court to have given, but it was not its duty to dissect it and give it in part and refuse to give the remainder. *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 36 Am. St. 182;

Singer v. Martin, 96 Wash. 231, 164 Pac. 1105; *Nollmeyer v. Tacoma R. & P. Co.,* 95 Wash. 595, 164 Pac. 229; *Fehler v. Montesano,* 110 Wash. 143, 188 Pac. 5.

(8) The appellants also complain that the court refused to give their requested instruction as follows:

"If the plaintiff has not satisfied you of the non-receipt of the letter of March 19, 1919, claimed by defendant Groll to have been mailed to plaintiff at Juneau, Alaska, on that date, then the plaintiff cannot recover on any obligation incurred by him after the said letter reached him in the ordinary course of mail."

The letter mentioned in this instruction is one which Mr. Groll claims to have mailed to the respondent, wherein he warned the respondent not to contract any indebtedness on account of the appellants. Respondent denied ever having received this letter. While it would have been proper enough for the court to have given this requested instruction, we think there was no error in its failure so to do, because the court, by its instructions, covered the question when he said to the jury:

"Even though you find that the defendants did request the plaintiff to make expenditures for their account, nevertheless, the defendants had the right to revoke such authorization at any time and the plaintiff would not be entitled to recover for any expenditure not made and incurred before such revocation."

(9) At the close of the plaintiff's case, the defendants moved for a directed verdict, which was denied and complaint is made thereof. There is a very sharp conflict of testimony throughout this case. The respondent, on the one hand, contends that he was expressly orally authorized by the appellants to contract the various obligations for which he sues, whereas the appellants deny that any such authority was given, and claim, on the contrary, that the respondent had no au-

thority from them to contract any indebtedness or to take any steps whatsoever to carry out the proposed program until they had gone to Alaska and for themselves looked into the proposition. But these were all questions for the jury. We have very carefully gone through the testimony and find that there was substantial evidence in support of each item of expense which the court allowed the jury to consider.

Other objections have been made and argued by the appellants, most of which are covered by what we have already said, and those we have not discussed, we have carefully considered and are unable to find merit in them. The judgment is affirmed.

PARKER, C. J., MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 15870. Department One. January 24, 1921.]

In the Matter of the Condemnation for PHINNEY AVENUE, SEATTLE.[1]

MUNICIPAL CORPORATIONS (267-3)—PUBLIC IMPROVEMENTS — ARBITRARY AND EXCESSIVE ASSESSMENT. It is manifest that straightening out a jog in the street making it more valuable for general use and increasing public traffic over it, affects all property similarly situated, and consequently an assessment of property from which land was taken at seven times the amount assessed against similar tracts, not condemned, is void as arbitrary and made upon a fundamentally wrong basis.

SAME (267-3). Such an assessment against private owners could not be justified by the fact that a portion of the street in front of their lots was in private ownership, which, if asserted, would cut off their access to the street.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 5, 1920, confirming a street assessment roll, after a hearing upon objections thereto. Reversed.

[1]Reported in 194 Pac. 977.

Jackson Silbaugh, for appellants Rippe *et al.*

Henry W. Pennock, for appellant Seattle School District No. 1.

Walter F. Meier, George A. Meagher, and *Charles T. Donworth,* for respondent.

FULLERTON, J.—Phinney avenue, a street of the city of Seattle, lying between north Sixty-fifth street and north Sixty-eighth street, extends north and south. As originally dedicated, it was sixty feet in width. In 1909 the city, mistakenly conceiving that there had been no dedication of a street between these places, by ordinance established a street thereover, and directed that the private property necessary for the purpose be acquired by condemnation. The property ordered condemned followed the line of the dedicated street on its west side. On the east side, it extended twenty feet into privately owned property. Condemnation proceedings were had under the ordinance in 1911, and resulted in an award to the persons alleged to be owners of the property. After the entry of this judgment, the city took possession of the property and improved it as a street for its full width. Within a year following the decree of condemnation, the mistake as to the existing street was discovered, whereupon the city petitioned the vacation of, and had vacated, the existing decree, and amended its petition asking for a condemnation of the twenty foot strip then in private ownership. This proceeding came on for hearing in 1919, when verdicts and judgments were entered in favor of the owners for the value of the land taken.

The strip condemned was some six hundred and sixty-six feet in length. Measuring from north to south, the first three hundred and sixteen feet was owned by Seattle School District No. 1; and for the property, the

school district was awarded eleven hundred and fifty-two dollars. The remainder of the strip was the property of one Olaf Nelson, and for his property an award was made of thirteen hundred and ninety-five dollars.

Prior to the entry of the first decree of condemnation, the land owned by Nelson formed a part of a larger tract lying to the east. After the decree was entered and the street improved, Nelson platted the remaining tract into lots and blocks, conforming the westerly ends of the west tier of lots to the street line as it would have been had the decree been allowed to stand and as it was finally delineated by the last decree. These lots between the times of the two decrees passed into other ownerships.

The ordinance authorizing the widening of the street directed that the expense thereof be charged to the property benefited. After the return of the verdicts fixing the amount of the awards and the confirmation thereof by the court, the matter of making the assessments upon the property benefited was referred to the eminent domain commission of the city of Seattle. The commission returned a roll in which they assessed the entire benefits on the property abutting upon the property taken, making no assessment at all upon the property upon the opposite side of the street nor upon property lying either north or south of the property taken. On objection of the owners of the assessed property, this assessment was set aside as arbitrary.

The matter was again referred to the eminent domain commission, and another roll returned in which the property of the school district was assessed at two dollars and twenty-five cents a front foot, the lots above mentioned at from ninety-six to one hundred and three dollars per lot, and the property on the opposite side of the street at eight dollars per lot. To this roll, ex-

ceptions were taken by the school district and by the lot owners on the east side of the street, on the ground that the assessment was in excess of benefits, disproportionate to relative benefits, and fundamentally erroneous and arbitrary because founded on the theory that the property from which the condemned property was taken should bear the burden of the awards. The trial court overruled the objections and confirmed the assessment. This appeal is by the school district and the lot owners on the east side of the street from the order of confirmation.

Phinney avenue, to the south of the condemned land, is eighty feet in width, and the effect of the condemnation proceeding was to widen the street from that point to a point corresponding to the north line of the property of the school district. One of the commissioners, in explaining the difference between the amount of the assessment made on the property on the east side of the improved street and that on the west, after testifying that the property on the west side was probably of the greater value than that on the east because of greater elevation, and that as a "usual procedure," the commission made a difference in the amount of the assessment owing to the side of the street "the job is on," testified, in answer to questions put to him by the attorney for the school district, as follows:

"Q. Now, will you explain to the court what it is that renders the benefit seven times as great to this school property as to the property lying immediately across the street, by reason of making that street 80 feet wide instead of 60?

"A. Well, it was our contention and is yet; it was at the former trial and is now, that the elimination of that jog in the street is of big benefit for all the property concerned on the east side of the street; and that all simmers down to that point; if you want to bring it down, that is just what we figured.

"Q. Now you say—here is our property approximately 350 feet north of the jog—and you say that by putting the jog at the top end of our property instead of having it 350 feet below, we are benefited seven times as much as these people across here; is that the idea?

"A. That is the idea, and I think there is no question about it.

"Q. Is there any difference as to the value of the entire tract with the strip or without the strip?

"A. Well, I will tell you what I consider it; that 20-ft. strip added to the property there certainly didn't give it any additional value.

"Q. It didn't give it any additional value?

"A. No, and figuring backwards on it, the elimination of that strip more than balanced the original value. That is the way I figured it all the way through.

"Q. Do I understand you that your theory is this; that whenever a jog occurs, the man that owns the property where the jog hits, or whose property would be taken if it was taken out, may just as well consider that part beyond the jog as worthless, because some time the city may push the street through, and he lose it. Does your theory go that far?

"A. No, I would not go that far, not in all cases; but we have had so many cases to deal with in the proposition and we have seen it worked out on the ground, but I can say as a general rule that is pretty close to the facts."

It would seem to require no argument to show that, in so far as the school district's property is concerned, the assessment was made upon a fundamentally wrong basis. The only benefits the school district derived from the improvement arose from the fact that the street was thereby made more convenient for its use, and from the further fact, perhaps, that the improvement of any thoroughfare increases public traffic over it, and thus renders it more valuable from the standpoint of a person desirous of purchasing property. But it is at once manifest that benefits of this sort

affect alike all property similarly situated which abuts upon or is adjacent to the street. The benefits cannot be affected by the side of the street "the job is on." Nor can they be affected by the fact that the "jog" removed happens to be on one side of the street instead of on the other.

The benefits arise after the improvement is made—in this instance they arose after the strip condemned was converted into a part of the street—when all property similarly situated stands upon an equality. An assessment proceeding, therefore, which results in the assessment of one tract of property seven times as great as it does another of like area and situation is unjust and arbitrary and should not be allowed to stand. The trial court seemed to feel that the assessment against the school district property was unjust and sought to justify it by saying that "for all practical purposes it was taking money out of one pocket and putting it in another;" meaning, we suppose, that the taxpayer's money will pay the assessment in any event and that it can make but little difference whether the money is taken from the school fund or from some other fund raised by taxation. But the reasoning is inconclusive. Property devoted to school purposes is assessable because it is specially benefited, and because to exempt it would unjustly increase the burdens upon the privately owned property in the assessment district. But no rule of law permits its overassessment merely because the assessment must be paid from public funds.

The assessment on the lots of the private appellants is thought to be justified by the fact that a portion of street in front of their lots was in private ownership, which ownership, if asserted, would cut off their access to the street. But as to these parties, the contention is fanciful rather than real. The owner of the

land who platted the lots platted them with reference to the street as it actually existed, showing thereon that the lots abutted upon an existing street. By this act, he estopped himself from afterwards asserting ownership to the strip to the detriment of the purchasers of the lots and their successors in title. No access to the street, therefore, was granted these owners by the later condemnation proceedings which they did not then possess, and consequently no special benefit to their property was conferred thereby other than the benefit arising from the widening of the street, which, as we have shown, was a common benefit to all the adjacent and abutting property.

The order of confirmation is reversed as to the parties appealing, and the cause is remanded with instructions to set aside the roll as to such parties.

PARKER, C. J., BRIDGES, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16054. Department One. January 21, 1921.]

NELLIE E. CARNEY, *Appellant*, v. JOHN E. CARNEY *et al.*, *Respondents*.[1]

DIVORCE (58)—LIS PENDENS (6, 7)—CANCELLATION OR MODIFICATION—OPERATION AND EFFECT. Under Rem. Code, § 998, providing that, pending an action for divorce, the court may make proper orders for the disposition of the property, the court has power to order the renewal of a mortgage upon property affected by a notice of *lis pendens* and to suspend the operation of the *lis pendens* to the extent of effecting such renewal freed from plaintiff's claim under the *lis pendens;* such an order not being in any just sense a cancellation of the *lis pendens*.

STATUTES (45)—REPEAL—IMPLIED REPEAL OF SPECIAL BY GENERAL ACT. Rem. Code, § 243, relating to *lis pendens* is a general act and does not repeal the divorce statute, Id., § 998, which is a special statute; since repeals by implication in such a case will arise only where the repugnancy between the two statutes is very clear.

[1]Reported in 194 Pac. 991.

Appeal from an order of the superior court for King county, Frater, J., entered May 29, 1920, upon an order in an action for divorce, granting defendant's application for the modification of a notice of *lis pendens*. Affirmed.

McClure & McClure, for appellant.

Jones, Riddell & Brackett, for respondents.

FULLERTON, J.—On April 19, 1919, the appellant, Nellie E. Carney, began an action in the superior court of King county seeking a decree of divorce from her husband, John E. Carney. In her complaint, after alleging facts constituting grounds for a divorce, she alleged in substance that, on and prior to April 7, 1919, the parties as husband and wife were possessed of certain described real property situated in King county, of the value of sixty thousand dollars, the legal title to which stood in the name of John E. Carney. That, on the day named, John E. Carney conveyed the property by a warranty deed to Florence E. Curtis, his daughter by a former marriage. That the purported conveyance was made without consideration, and in anticipation of her action against him for a divorce, and for the fraudulent purpose of cheating and defrauding her of her interests in the property.

At the time of filing her complaint, the appellant filed in the office of the auditor of King county a notice of the pendency of the action, under Rem. Code, § 243, in which was stated the names of the parties to the action and a description of the real property affected thereby. Florence E. Curtis was made a party defendant to the action, and in due time answered to the complaint, putting in issue its affirmative allegations in so far as they related to her, and pleading affirmatively facts tending to show a right to the conveyance

made by her father to her. The defendant John E. Carney also answered, his answer being a denial of the acts on which the action for divorce is based and an affirmative plea relating to the conveyance in substance the same as that of his daughter.

Thereafter and on May 17, 1920, Florence E. Curtis filed in the action a petition praying a modification of the notice of *lis pendens,* so as to permit the extension or renewal of a certain mortgage then outstanding against one of the tracts of property described therein. In her affidavit filed in support of the application, she alleged that the mortgage in question was executed in 1909; that it was executed by her father and mother, together with other owners in common of the property, and existed thereon at the time of her father's subsequent marriage to the present appellant; that it was originally for the sum of twenty-seven thousand dollars, and that it bore interest at the rate of six per centum per annum; that, at various times subsequent to its execution, payments were made on the principal of the mortgage and the time of the maturity thereof extended, so that, at the time of the filing of her petition, there remained due thereon the sum of eighteen thousand dollars; that this sum was then due and the mortgage subject to foreclosure, and that she had been unable, because of the filing of the notice of *lis pendens,* to procure a further extension of the time of payment of the original mortgage, or procure a new loan on the property in that amount from persons who would otherwise be willing to make such a loan.

Notice of the application was served upon the other parties to the divorce proceeding. The appellant appeared and moved to quash the application, which motion the trial court overruled. She thereupon stood upon her motion without further pleading, whereupon

the court made an order, the material part of which appears in the following quotation:

"Ordered, adjudged and decreed that the petitioner, herein, Florence E. Curtis, be, and is hereby authorized to refund that certain mortgage upon Lot Three (3) Block Forty (40), A. A. Denny's Sixth Addition to the city of Seattle, King county, Washington, which mortgage is dated February 11, 1909, and recorded in Volume 433 of Mortgages at page 207 of the records of the Auditor's office of King county, Washington, by the execution of a new mortgage upon the said lands not to exceed in amount Eighteen Thousand Dollars ($18,000.00) for a period of not more than five (5) years and at a rate of interest not to exceed eight (8) per cent per annum, and

"It is further ordered that when executed by her and recorded together with the satisfaction of said present mortgage upon said real estate, the said new mortgage shall be and is hereby decreed to constitute an incumbrance and charge upon said property of the same standing and legal effect as the mortgage now existing upon the said above described lands, and that the said mortgage when so executed, shall be and is hereby decreed to be prior in lien to any right in the said property of any party to this action, and jurisdiction is hereby reserved to this court to enter herein such supplemental decree or order further confirming the title and right of any such new mortgage as in the judgment of the court may be fit and proper."

It is from this order that the present appeal is prosecuted.

The statute relating to the filing of a notice of *lis pendens* is found in Rem. Code, § 243, and reads as follows:

"In an action affecting the title to real property the plaintiff, at the time of filing the complaint, or at any time afterward, or whenever a writ of attachment of property shall be issued, or at any time afterward, the plaintiff or a defendant, when he sets up an affirmative

cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterward, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: Provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record."

It is the appellant's contention that the court in making the order from which the appeal is prosecuted exceeded its powers. The argument is that the proceeding relative to a notice of *lis pendens* is wholly statutory; that the statute itself defines its effect and limits the powers of the court with reference thereto;

and since the statute provides that the court may, in its discretion, at any time after the action shall be settled, discontinued or abated, order the notice to be canceled of record, its power to cancel or modify such a notice is limited to the time so specified, and hence cannot be exercised during the pendency of the action. But to this we think there are at least two sufficient answers. The statute relating to divorce and alimony, at § 998, Rem. Code, provides that:

"Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the . . . property . . . of the parties as may be deemed right and proper. . . ."

The term "property" as here used includes real as well as personal property, and the statute is sufficiently broad, standing alone, to warrant an order of the court during the pendency of an action for divorce authorizing the parties to the proceeding, or some one of them, to renew, contract to continue for a definite time, or pay in whole or in part, a mortgage upon the community property of the parties, or the separate property of any one of them. The authority thus conferred warrants the order made by the court in the present instance, if the statute has not been superseded by the *lis pendens* act, which is an enactment by the legislature later in time than is the section of the statute cited from the divorce act. But the divorce statute is special; that is to say, it is special in the sense that it is applicable only to actions brought for the purpose of dissolving a marriage contract. On the other hand, the statute relating to the filing of a notice of *lis pendens* is a general statute. By its terms it is made applicable to all actions which affect real property. But it contains no special repeal of the sec-

tion of the statute cited from the divorce act, and if there is a repeal at all, it is a repeal by implication.

"But repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91, quoting from Cooley, Constitutional Limitations (6th ed.), p. 182.

The statute of *lis pendens* first appeared in the legislation of the state in the act of March 15, 1893 (Laws of 1893, p. 407). It is entitled, "An act to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial." The act as a whole is confined to the general purpose indicated in the title. Plainly we think there is not in it any indication of an unequivocal intent to repeal or supersede the special provision cited from the divorce statute. It will follow, therefore, that the order of the court may rest on this express provision of the statute.

The second answer is that the order of the court is not, in its substance and effect, a cancellation of the notice of *lis pendens*. It is not disputed that the mortgage lien sought to be renewed is a valid and subsisting lien upon the property, and that any award of the property which the court may make to the appellant must of necessity be subject and inferior to the lien. The amount of the mortgage will not be increased, and the interests of the several parties in the property will be the same and subject to the same charge as they were before. This, we are clear, can in no just sense be said to be a concellation of the *lis pendens*.

The inquiry, we think, need not be pursued further. The order should be affirmed, and it will be so ordered.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 15961. Department Two. January 24, 1921.]

W. J. JAMMIE, *Respondent*, v. F. B. ROBINSON *et al.*, *Appellants*.[1]

FRAUD (3)—FRAUDULENT REPRESENTATIONS IN GENERAL—NATURE—ADOPTION OF STATEMENTS. Where the seller of a moving picture business referred to conditions represented to him by his vendor as to the business at a time when his vendee was present and negotiating for the business, he adopted the representations and made them his own, and must answer therefor if he knew them to be false, since his conduct amounted to a concealment or suppression of the truth.

CONTRACTS (8)—REQUISITES AND VALIDITY—AGREEMENT TO MAKE CONTRACT IN FUTURE. Where the parties, when they met pursuant to appointment, contemplated a formal and complete contract of sale of a moving picture business, their prior correspondence containing a proposal and acceptance of the terms offered, to be closed shortly, did not constitute a completed contract, as there was no meeting of minds.

FRAUD (22)—EVIDENCE—SUFFICIENCY. Upon an issue as to fraud in the sale of a moving picture business, there is a question for the jury where the seller represented that the theater was clearing $250 to $300 per month, and he admitted on the stand that it lost about $3.50 per day.

SAME (23)—DAMAGES—MEASURE. In an action to recover money paid for a moving picture business under false representations, the measure of damages is not the difference between the actual value and the value as represented; but the buyer, having tendered the theater back, may recover the money paid under the contract vitiated by fraud, and this includes a deposit for rent of the premises.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered December 2, 1919,

[1]Reported in 195 Pac. 6.

upon the verdict of a jury, in an action to rescind a contract for fraud. Affirmed.

F. M. Goodwin, for appellants.

Robertson, Miller & Robertson, for respondent.

HOLCOMB, J.—The second amended complaint, on which this cause was tried, alleged that defendant F. B. Robinson made certain false and fraudulent representations on which plaintiff relied as to a motion-picture theater in Ellensburg, Washington, known as the Isis Theater, namely; that he, Robinson, had procured the consent of Millie B. Sayles to an assignment and lease of the theater, when, in fact, she had not consented thereto; that the moving-picture business of the theater was netting two hundred and fifty to three hundred dollars per month; that the daily receipts did not run less than from thirty dollars to seventy-five dollars; that defendant knew these statements to be false and untrue. Plaintiff demanded to recover the amount paid on the written contract, to defendant, namely, $846.70, with interest thereon from the date of the contract. The complaint further alleged, in effect, that, on or about June 11, 1917, plaintiff was ejected from the Isis Theater by Millie B. Sayles, the owner thereof.

A second cause of action set up in the second amended complaint demanded damages in the sum of three hundred dollars on account of loss in the operation of the picture show, during the period plaintiff had it, from March 6 to June 10 or 11, 1917. But this cause of action was withdrawn from the jury upon an instruction that plaintiff could not recover thereon.

Defendants, in answer to the second amended complaint, admitted that they received $846.70 from plaintiff on account of the purchase price of the assign-

ment of the lease of the moving-picture business referred to in the complaint, but denied that defendant Robinson made any fraudulent representations in connection with the assignment of the lease and the sale of the moving-picture business to plaintiff, and denied that Millie B. Sayles refused her consent to the assignment of the lease from Robinson to plaintiff; set up, by way of counterclaim and cross-complaint, that plaintiff agreed to pay the sum of $1,396.70 for the assignment of the lease and the purchase of the moving-picture business referred to, setting out the agreement in full; and alleged that he had paid only the sum of $846.70 and that a balance was due of $523.60 on account of the agreed purchase price. They further alleged that plaintiff agreed to pay defendant the rental of the theater for the months of March and April to May 9, 1917, as it became due, defendant having paid the rental in advance, such rental being the sum of $115 per month for each of those months, making a total of $230, no part of which has been paid. They set up a further second cause of action and cross-complaint upon a promissory note executed by Jammie and his wife to Robinson for $120.

For reply to the counterclaim and cross-complaint, plaintiff denied all the allegations contained therein, except the execution of the memorandum agreement referred to by defendants in paragraph one of their counterclaim and cross-complaint. Upon these issues, the cause went to trial before the court and a jury.

Appellants make ten assignments of error, five of which were determined in the submission of the cause to the jury in favor of appellants under the following instruction:

"The plaintiff alleges and claims as a fraudulent representation that the defendant Robinson told him that he would procure the consent of Mrs. Sayles to

the assignment of the lease from him, Robinson, to the plaintiff Jammie. But I charge you that, as a matter of law, this is not a fraudulent representation, because the plaintiff Jammie was not injured by it, even though it was made, inasmuch as he became the possessor and owner of the lease and the moving-picture business when he became the occupant of the premises with the knowledge of Mrs. Sayles."

There is no need of further discussion of those claims of error arising upon the ruling upon a motion to strike a paragraph of the second amended complaint and permitting respondent to amend a paragraph thereof, overruling appellants' objection to and admitting evidence of an alleged eviction from the theater and refusing to give appellants' requested instructions numbered 5 and 7.

The court gave proper instructions to the jury upon the questions of fraud and deceit and the *quantum* of proof necessary to enable one to recover upon such allegations, and, after a careful examination of the instructions and the requested instructions of appellants that were refused, we can find no error in the instructions given or in rejecting any of the instructions requested, if the case was a proper one to go to the jury at all.

The court gave very clear, concise and correct instructions to the effect that the basis of respondent's action is fraud; that the fraud which gives rise to an action of deceit exists where a person makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge, when he does not know whether it is true or false, with intention to induce the person to whom it was made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived to so do or refrain from doing, to his damage.

The jury were also told that, in cases of this kind, the proof required to sustain such allegations of deceit or fraud must be clear, cogent and convincing; that fraud is never presumed. They were told that the material allegations of deceit and fraud involved in respondent's complaint were these: (a) That the appellant represented that the moving-picture business was netting him (Robinson) from two hundred and fifty dollars to three hundred dollars per month; (b) that he represented that the daily receipts did not run less than thirty dollars to seventy-five dollars.

The jury were then told that they must be convinced under the rule as to the nature and quantity of proof required: First, that the defendant made one of the representations to plaintiff above enumerated as a fact, as distinguished from the mere expression of an opinion; second, that one or more of such representations were false; third, that the defendant knew it to be false or made it recklessly of his own knowledge when he did not know whether it was false or true; fourth, that such representation was made with the intention of inducing plaintiff to purchase the moving-picture business; fifth, that plaintiff, acting with reasonable prudence, relied upon such representations and was thereby deceived and induced to purchase the moving-picture business, and that, with regard to the element of reliance the representation must have been the cause which directly and proximately induced plaintiff to purchase the picture-show business, that is, the cause without which he would not have purchased; sixth, that plaintiff bought the moving-picture business to his pecuniary damage.

The jury were also told that fraud cannot be based on mere expression of opinion, and that a party who makes an independent examination or investigation as to any property or business is bound thereby and can-

not charge another with fraud as to any fact or matter coming within the scope of such examination or investigation; and that, in such case, the parties are upon equal ground and their own judgment must be their guide in coming to conclusions.

They were instructed, however, that, even though plaintiff may have made an independent investigation of the business of the Isis Theater, this would not deprive him of the right to rely upon representations of fact made to him by the defendant, which may have been difficult to ascertain by investigation, and in relation to which the defendant may have had better means of knowledge than the plaintiff.

The court also instructed that, when one person states to another his opinion as to the value of any property merely as his opinion, not as a fact that he knows to be true, then the person to whom such opinion is stated in this manner has no right to rely upon such opinion, but must exercise his own judgment.

The jury were instructed that, if they found for the plaintiff, to allow him the sum that he paid for the business, to wit, $846.70, with interest at the rate of six per cent per annum from the date of payment until the date of the verdict. They were, however, further instructed that, plaintiff having admitted the execution of a promissory note for $120, they should find for the defendants in that sum with interest at the rate of eight per cent per annum from April 13, 1917, even though they should find for the plaintiff on his cause of action and deduct it from the amount of recovery for the plaintiff. The jury found for the plaintiff and fixed his recovery at the sum of $838.86 and costs.

During the trial, appellants objected to the admission in evidence of alleged verbal representations of appellant F. B. Robinson made in Ellensburg, on or about March 5 or 6, 1917, and thereafter, as to the earnings

and business of the Isis Theater, and demanded an instruction to the effect that the undisputed evidence in the case established the fact that, by correspondence and telegrams passing between respondent and appellant Robinson, prior to the execution of the formal contract of March 5, 1917, respondent had contracted to buy appellant's interest in the Isis Theater and lease therefor at an agreed price and upon terms substantially embodied in the formal contract, and that respondent became thereby obligated to conclude such purchase by making the payments and executing the later contract; and his failure so to have done would have rendered him liable in damages to the appellant; that no misrepresentations alleged by respondent in his complaint could be considered as affecting the validity of the contract of March 5, 1917, which respondent was required by his agreement to make substantially in the form in which it was executed. The court's rulings in admitting the testimony above mentioned and refusing the instruction above quoted present the most difficult questions in this case.

The situation under the facts in this case was somewhat peculiar. Robinson had, in January of the same year, purchased this same theater and its business from one Baumgartner, who had operated it for some time theretofore. At the time he was negotiating for the purchase from Baumgartner, Mrs. Jammie, wife of respondent, and who conducted most of the correspondence between respondent and appellant, was present and knew of the representations made by Baumgartner to Robinson and of the consummation of the negotiations in the purchase by Robinson of the theater business. She had gone there herself in answer to an advertisement that had been published in the Spokane Spokesman-Review for a prospective purchaser by Baumgartner; but when she got there she

found Robinson already negotiating. She knew that Baumgartner made certain representations as to the receipts and disbursements and net profits of the theater, and to her, they must have been quite attractive, as they were to Robinson; for in the next month, February, she being in Spokane and Robinson in Ellensburg operating the theater, she wrote or caused to be written a letter over the name of her husband to Robinson at Ellensburg, inquiring if the theater were for sale, to which he replied, on February 21 as follows:

"Some of your people were here, I believe, about the time I purchased from Mr. Baumgartner, so you understand all the conditions. I paid Mr. Baumgartner $750 for the assignment of his lease, and in addition all his advances for rent and for film service. I will accept $1,000 for a similar assignment, purchaser to repay in addition all amounts prepaid for rent and film service beyond the date of my surrender of possession. I add the $250 to what I paid to cover expenses to which I have been put in making the purchase, advancing the business and some few supplies added. If interested wire or write by return mail."

On February 23, respondent from Spokane, replied to Robinson as follows:

"Received your letter this morning, and have read over your proposition. Will state that we were over at the time you purchased the Isis theater. Now what we would like to know is this, would you consider it on terms? If so, we could give $500 cash and $100 monthly. Of course we could pay rent of films and would like to know if you had to make a deposit of $250 to owner of building, and would we have to? Kindly state what improvements you have made, and state if those machines belong to the building or the purchaser, and oblige."

On February 25 Robinson replied:

"Replying to your favor of the 23rd at first opportunity, will say that I would accept $500 cash which

you offer, and balance $100 per month if balance is secured by signers or otherwise, so that I could bank the notes. I paid all cash to Baumgartner, you know.

"Yes, I had to pay $250 on rent to apply on last months of lease and you would have to do so. Of course this is so much rent paid and leaves over two months at the end of the year on which you have no rent to pay.

"The improvements I have made consist only of some kalsomining, linoleum, new boards, printed matter, signs, etc. The machines belong to the building along with the equipment, wiring, seats, scenery, etc.

"It would cost you several thousand dollars to buy the equipment otherwise, and it is cheaper and better not to own it since you can rent it so cheaply. I shall await your prompt reply, as if I am to sell to you I desire to make other arrangements . . ."

On February 27, at 1.40 p. m., respondent wired Robinson at Ellensburg: "Can pay $500 and $250 rent; do not want to sign note for balance. Will sign contract to pay $100 monthly. Answer today."

On the same day, at 4:50 p. m., appellant wired:

"Will accept your offer. Advise date of your arrival here."

On February 27, from Spokane, respondent replied as follows:

"Got your message at 6:30 tonight, so will answer at once. Now it will be a few days before I can come, as my home is in Whitefish, Montana. I am leaving for there tonight to get our trunk, as we were just in Spokane on a visit, as my wife has been to see Mr. Baumgartner when she was there, so hold bargain open, as I will be there as soon as possible."

Appellants contend that these letters and telegrams constitute an unequivocal offer and acceptance of all the terms of the contract stated, and that they show that respondent had made an independent investiga-

tion and that Mrs. Jammie, the wife of respondent, had the same data as Robinson.

When respondent closed his case, appellants challenged the sufficiency of his evidence and moved for an instructed verdict for appellants, and upon appellants' counterclaim for the balance due under the contract, for the two hundred and thirty dollars advanced as rent, and the one hundred and twenty dollars due on the note. These motions were denied, although, in submitting the case to the jury, the court directed, as heretofore stated, a verdict for appellants on the one hundred and twenty dollar note. This denial of the challenge to the evidence is set up as error.

Appellants contend that respondent's evidence clearly showed: First, that a contract was made and entered into by correspondence; second, that the negotiations were opened by respondent Jammie on February 19, at which time appellant had been in possession but a short time; third, that appellant had made no representations whatever as to the moving-picture business up to the time respondent's offer was accepted; fourth, that respondent had conducted an independent investigation of the moving-picture business about the time Robinson purchased it, and that Mrs. Jammie, the wife, acting for respondent, obtained all her information from Baumgartner, who supplied her with the information as to the earnings of the theater; that respondent relied upon Baumgartner's statements of the earnings of the theater when the contract with Robinson was closed by wire; that all this information was made known to respondent and he possessed the same information as Robinson as to the earnings of the theater; fifth, that no payments beyond $846.70 were ever made on the contract by respondent and there was a balance due appellant of $550; sixth, that appellant paid $230 rent from

March 9 to May 9 in advance, which amount respondent agreed to repay, and that such sum had not been repaid. (Then follow several immaterial assertions under the submission of the case to the jury.) And, finally, it is contended that there was no change in the written contract over those contained in the correspondence heretofore set out.

On the other hand, respondent contends that the contention that no representations were made by Robinson prior to the execution of the contract cannot be sustained. It is conceded that Mrs. Jammie went to Ellensburg at about the time Robinson purchased the theater from Baumgartner and inquired about the theater from Baumgartner, and that Baumgartner made representations as to its earnings. What Baumgartner represented is shown by a statement of what he claimed the earnings to be while he operated the theater, and Robinson knew what Baumgartner had represented to Mrs. Jammie as to those receipts and that Baumgartner claimed that the average receipts were forty-eight dollars a day; and, it being shown that his (Robinson's) average receipts, as claimed by him, were only twenty-eight dollars a day, he knew that Baumgartner's figures were not reliable. Respondent therefore claims that, knowing that respondent's wife had talked to Baumgartner, it was Robinson's positive duty to inform respondent in his correspondence with him that the theatre was not making anywhere near the amount which Baumgartner claimed it was making, and that there was imposed on him the duty to speak, and that silence under such circumstances was just as fraudulent as a positive representation would have been.

12 R. C. L. 313 is quoted as follows:

"But where a matter is not equally open to the observation of both parties and is not discoverable by

the exercise of ordinary diligence, mere silence on the part of the one having the knowledge may constitute fraud. A reason given for this rule is that, since matters are not what they appear to be and the true state of affairs is not discoverable by diligence, deceit is accomplished by suppression of the truth."

Respondent then contends that, since Robinson in his first reply to the inquiry of respondent referred to the time that Mrs. Jammie was in Ellensburg about the time Robinson purchased from Baumgartner, "so you understand all the conditions," that amounts to a misleading representation. It is argued that this statement was in itself sufficient under the circumstances to make appellant's conduct fall outside of the general rule that mere silence does not constitute fraud. 12 R. C. L. is again quoted, at page 320, as follows, to support this position:

"Therefore each party to the contract must take care not to say or do anything tending to impose upon the other. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts, or conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, word or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes a fraud."

Accepting the above as a correct statement of the law governing the matter, we are of the opinion that, when Robinson referred to the conditions represented by Baumgartner as to the business of the theater when Mrs. Jammie was there, while Robinson was negotiating with Baumgartner, he adopted and made them his own. The question then is, whether or not the letters and telegrams constitute a completed contract.

In *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135, it was stated that:

"They had agreed upon the main questions, viz., the land to be logged, the price per thousand, and the place of delivery and time of payment, and about the time the work was to begin, and also that the contract should be reduced to writing wherein the details should be stated. But while these features had been agreed upon, they had not passed the stage of negotiations, because they had not been reduced to writing as the parties contemplated. The rule in such cases is stated in 9 Cyc. 280, as follows:

" 'Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus, where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed.' "

The court also said in that opinion: "At most the parties were negotiating upon the terms of the agreement to be entered into between them." So in this case, it was shown by the letters themselves that the parties contemplated a written contract, and a written contract was drafted by Robinson himself and executed by the parties.

In *Stanton v. Dennis*, 64 Wash. 85, 116 Pac. 650, where the dispute was whether there was a completed contract or an agreement setting out some of the terms of a contract to be entered into later, and where the writings which had been exchanged contained the words, "formal contract to follow," and the word, "accepted," this court said:

"The face of the writing, it is at once apparent, indicates that it was intended as the latter rather than the former. After specifying certain particulars, it expressly provides that a formal contract is to follow.

If the writing itself was intended as the completed contract, there would have been no need for this proviso. A contract complete in itself does not need the sanction of another contract."

To the same general effect is *Chinook Lum. & S. Co. v. McLane Lum. & S. Co.*, 107 Wash. 587, 182 Pac. 625.

When the parties met together in Ellensburg, on a Sunday, Robinson advised deferring the matter of drafting a contract and executing the same until the next day, and suggested himself, a lawyer, as a competent person to draw the contract.

It seems thoroughly apparent, therefore, that since the parties contemplated a formal and complete contract, they did not contemplate that the letters and telegrams constituted a completed contract. There had been, therefore, no meeting of minds when the parties met together in Ellensburg after the exchange of the letters and telegrams.

When they met in Ellensburg, Robinson showed respondent books, papers and contracts kept by Baumgartner and by himself; and, as respondent's evidence tends to show, represented that the theater was clearing $250 to $300 per month, and that its business was exactly as Baumgartner had told Mrs. Jammie. This again connects the first representation made by Robinson as to the conditions represented by Baumgartner to Mrs. Jammie with himself. He admitted in his own evidence that the theater, while he was running it, lost about $3.50 per day, instead of profiting, and that he did not inform respondent thereof.

We are therefore of the opinion that the case was a proper case to go to the jury on the questions of misrepresentation and deceit.

Appellants also attack the instruction to the jury as to the measure of damages which permitted respondent to recover the money paid less the note which he

had given to Robinson. Appellants insist that the proper measure of damages in an action such as this is only the difference between the actual value and the value as represented; citing *Hunt v. Allison,* 77 Wash. 58, 137 Pac. 322; *Bunck v. McAulay,* 84 Wash. 473, 147 Pac. 33; and *Parkhurst v. Elliott,* 103 Wash. 89, 173 Pac. 731.

That rule is applied in order to give the injured purchaser the benefit of his bargain and allow the highest measure of damages to which a party is entitled. But it does not preclude the recovery of moneys paid under a contract vitiated by fraud where no other benefits of the bargain are claimed or are allowed. *McRae v. Lonsby,* 130 Fed. 17; *Warwick v. Corbett,* 106 Wash. 554, 180 Pac. 928.

Under the contract entered into, respondent paid appellant $846.70. This was the amount, with interest from the date of payment, allowed by the trial court to be recovered upon the finding of the jury in favor of respondent, less the offset, which was made by the court, of the note.

Appellant contends that $230 of this amount should not be allowed because it was the payment of two months' rent in advance made by appellant; and the further sum of $146.70, deposited with the film exchanges; because those sums were sums for which respondent received the benefit. We can see no difference between these sums and any other sums paid for the theater business. The two months' rent in advance had been paid by appellant and respondent had agreed to repay it in the contract; and so with the sum deposited with the film exchanges. The $250 rent was for the last portion of the lease and was on deposit with the lessor and unused at the time the theater was given up; and all of these sums were part of the

$846.70 paid by respondent to appellant upon the execution of the contract.

On June 9, 1917, respondent tendered the theater back to appellants and the tender was refused. We do not consider that appellants can now claim recovery of the advance payments of rent for the last months of the lease to appellants, or the deposit for film exchanges.

Finding no reversible error, the judgment is affirmed.

MOUNT, MITCHELL, and TOLMAN, JJ., concur.

MAIN, J., concurs in the result.

[No. 15962. Department One. January 24, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. EMILY HOYLE, *Appellant*.[1]

INDICTMENT AND INFORMATION (52)—KIDNAPING—ELEMENTS OF OFFENSE—DESIGNATION OF PARENT OR CUSTODIAN. An information under Rem. Code, § 2410, charging the kidnaping of a child of tender years, naming it, by taking and detaining her with intent to conceal her from her parents or other persons having lawful care and control of her, is not defective in failing to name the persons from whom she was taken; since it is the identity of the child and not of the custodians that is material and has to do with the elements of the offense.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 23, 1920, upon a trial and conviction of kidnaping. Affirmed.

Dennis McClung, for appellant.

Joseph B. Lindsley and *James Emmet Royce*, for respondent.

[1]Reported in 194 Pac. 976.

HOLCOMB, J.—Appellant appeals from judgment on a verdict under an information charging:

"That the said defendant, Emily Hoyle, on or about the 1st day of December, 1919, in Spokane county, Washington, then and there being, did then and there wilfully, unlawfully and feloniously take and detain a child under the age of 16 years, to wit: one Jane Doe Charest, of the age of two weeks, with intent to conceal the said child from her parents or other persons having lawful care and control of her."

The trial court had overruled appellant's demurrer to the information upon the general ground that the information did not state facts sufficient to constitute a crime under the laws of Washington. Upon conviction, appellant moved for a new trial and arrest of judgment, both of which motions were denied. All these rulings are here urged as errors.

The statute upon which the information is founded is Rem. Code, § 2410.

"Every person who shall wilfully—

"(1) Seize, confine or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service, or with intent to extort or obtain money or reward for his return, release, or disposition, or to lead, take, entice away, or detain, a child under the age of sixteen years with intent to conceal him from his parent, guardian or other person having lawful care or control of him, or to steal any article upon his person; . . ."

Appellant contends that the information under consideration is fatally defective, because it fails to inform her from whom she is charged with kidnaping the child, and does not conform to the requirements of the statute.

It is correct, as urged by appellant, as stated in *State v. Carey*, 4 Wash. 424, 30 Pac. 729, and subsequent cases, that it is the law of criminal procedure,

"The accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

On the same line, in *State v. Ackles,* 8 Wash. 462, 36 Pac. 597, we said that the above requirement, under the constitution, can only be met by setting forth in the information "every fact constituting an element of the offense charged." And, in prosecutions for larceny from the person and robbery, we have held that, to charge the offense only in the language of the statute, was not sufficient when the accused might have committed every act charged in the information and yet not have been guilty of robbery (or of larceny from the person), because ownership of the property taken was not alleged in some person other than the defendant, or the control and dominion over the property taken. *State v. Dengel,* 24 Wash. 49, 63 Pac. 1104; *State v. Morgan,* 31 Wash. 226, 71 Pac. 723; *State v. Hall,* 54 Wash. 142, 102 Pac. 888.

Kidnaping is not larceny nor robbery. At common law, it was defined to be the forcible abduction or stealing away of a man, woman, or child from his own country and sending into another. It was treated as an aggravated species of false imprisonment, all the ingredients in the definition of the latter offense being necessarily comprehended in the former, with the additional ingredient of carrying the person detained out of his own country and beyond the protection of its laws. To constitute the offense, the asportation or carrying away must have been against the will and without the consent of the person detained, and without any lawful authority therefor. A child of tender

years was regarded as incapable of consenting to its own seizure and abduction, and when taken away from its rightful guardian, it must be deemed to have been taken away without its consent, as a matter of law, and it has been so expressly enacted in some jurisdictions. 8 R. C. L. 296, § 319.

The person seized and detained, or kidnaped against his will and consent, is the victim, not any other person, no matter how directly concerned with the person and welfare of the victim. A child of tender years not being able to consent, and the consent of any one not being a defense, therefore, the only ingredients of the offense—and they are denounced in the statute—are:

(1) That the accused did, in the jurisdiction of the court, commit the act.

(2) That it was wilfully committed, and without authority of law, i. e., unlawfully.

(3) That a child of tender years, fixed by the statute as under the age of sixteen years, was so unlawfully and wilfully taken and detained.

(4) The name and identity of the child of tender years so taken and detained.

(5) That the accused committed all the above acts with intent to conceal the child from its parents or other persons then having lawful care and control of the child—no matter who.

Those are the elements of the crime with reference to children of tender years, as defined by statute, and all the necessary ingredients. Those ingredients were set forth in the information. To them the accused could plead his guilt or innocence, and upon a judgment of conviction or of not guilty, could subsequently plead in bar of any prosecution for kidnaping,

"on or about the 1st day of December, 1919, in Spokane county, Washington, the child under sixteen

years of age, to wit, Jane Doe Charest, of the age of two weeks, with intent to conceal *that child* from her parents, or other persons having (then) lawful care and control over *that child.*"

The identity of the child, rather than the identity of the custodians, and the intent to conceal the child from any and all lawful custodians, with the time and place of taking and detaining unlawfully, identifies the crime. A verdict thereunder could certainly be shown by the face of the record to bar any subsequent prosecution for the same unlawful taking and detaining.

We therefore conclude that the information and verdict thereon were properly sustained, and the judgment is affirmed.

PARKER, C. J., BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16063. Department One. January 24, 1921.]

JOSEPH SUSSMAN *et al., Respondents,* v. MITSUI & COMPANY, LIMITED, *Appellant.*[1]

SALES (154)—DAMAGES (77)—MEASURE—FAILURE TO DELIVER PROPERTY. In an action to recover damages for breach of an executory contract to sell pig iron, in failing to furnish the commodity contracted for, after the plaintiff refused to accept material offered, the measure of damages is the sum paid on the contract and the loss of profits that would have been made upon a resale.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 26, 1920, upon the verdict of a jury in favor of the plaintiff, in an action for breach of contract of sale. Affirmed.

Trefethen & Findley, for appellant.

Jones, Riddell & Brackett, for respondents.

[1]Reported in 195 Pac. 3.

MACKINTOSH, J.—Action for damages for breach of contract for failure to furnish pig iron of the specified quality.

Appellant was the owner of about three hundred and fifty tons of "remelted pig iron made by electrical process from scrap steel," which was sold to the respondents through one Dillon. Respondents bought the material for the purpose of re-sale in Portland, Oregon. Upon inspection by the ultimate purchaser, the material was discovered to be of inferior quality.

The case, in the main, presents only questions of fact, which were tried to a jury. The statement of facts and abstracts are voluminous, and after a thorough examination of them, we deem it unnecessary to set out the facts with any detail in this opinion.

There are three principal assignments of error. First, it is claimed that no contract was executed between the appellant and respondents, that the contract of sale sued on was one between the respondents and Dillon, and that Dillon executed it in his individual capacity, and not as appellant's agent. This is purely a question of fact which was submitted to the jury upon proper instructions, under evidence which was more than sufficient to prove that the sale actually took place between the appellant and respondents through the instrumentality of Dillon, acting as appellant's agent.

It is next claimed, (a) that the contract was not breached for the reason that the material shipped was of the same quality and analysis as called for in the contract; and (b) that, even if the material was not according to the sample, the respondents are estopped to raise the issue, for the reason that the contract was completely executed and that, prior to the shipment of any material, respondents were advised as to the character of the material, and with that knowledge instruct-

ed the appellant to ship it. This also presents a question of fact merely, on which there was evidence from which the jury could properly arrive at the conclusion that the contract had been breached. The material had been sold "as per sample submitted and the analysis taken of the iron, which is as follows. . . ." The evidence is almost nearly conclusive that the material did not comply with the sample. There is some question raised as to whether the sample which the respondents had in their possession before they entered into the contract was received from the appellant. Although the piece of material passed through several hands, there was evidence before the jury which would justify it in determining that the sample was one delivered by the appellant from material in its possession.

Arguing the question of estoppel, it is the appellant's position that the respondent, having accepted the first three carloads of material, could not thereafter urge that the contract had been broken. The jury, however, was entitled to believe from the testimony that it had been agreed between the parties, a question having arisen as to the quality of the first shipment, that, nevertheless, the entire shipment should be sent on to the ultimate purchaser in Portland, the respondents agreeing they would not raise any question as to the character of the material unless their purchaser did so. The jury was justified in believing that the parties had mutually agreed that the whole shipment might be sent forward, the respondents relying upon it all being up to sample. The ultimate purchaser immediately rejected the material. If this was the understanding, it could not be the basis for estoppel or waiver of the conditions of the contract.

The next claim of the appellant is that, even if the contract was breached, the respondents failed to estab-

lish and prove such damages as were recoverable. The damages claimed were the amount of deposit paid by the respondents at the time they entered into the contract, the amount which they paid for the three cars delivered, less the amount which they received for the sale of these three carloads when the appellant refused to receive them back, and for loss of profits which the respondents would have made on their resale in Portland. The appellant claims that these items of damage indicated that the respondents are suing for breach of warranty, and that in the action they are trying to recover upon the theory of rescission. The action was not one for breach of warranty or rescission, but for damages for breach of contract in failing to furnish the commodity which was contracted for. This was not a contract which had been executed, and under which the material had been received and retained by the purchaser and who was suing for damages for breach of warranty, nor was it a contract which had been executed and where the material had been returned by the respondents, who thus rescinded the contract. This was an executory contract where the respondents had refused to accept the material as not complying with the contract and are suing for damages for failure to furnish the proper material.

The authorities distinguishing the measure of damage in these different forms of action are numerous, but the distinction is probably best made in the note to our case of *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, contained in 27 L. R. A. (N. S.) 925, where the following language occurs:

"It is well settled that, where a purchaser refuses to receive property tendered to him under an executory contract of purchase, on the ground that such property does not comply with the warranty or with the contract in general, if the seller fails to tender property that

does comply with the contract, the purchaser may recover whatever he has paid upon the purchase price, and also damages for the breach by the seller of his contract to furnish property of a certain description. Munford v. Kevil, 109 Ky. 246, 58 S. W. 703; Ideal Wrench Co. v. Garvin Mach. Co., 65 App. Div. 235, 72 N. Y. Supp. 662, affirmed without opinion in 181 N. Y. 573, 74 N. E. 1118; Sklarsky v. Marine Mfg. & Supply Co., 33 Misc. 761, 67 N. Y. Supp. 897; Rhea Thielens Implement Co. v. Racine Malleable & Wrought Iron Co., 89 Ill. App. 463; Azemar v. Casella, L. R. 2 C. P. 431, 23 Eng. Rul. Cas. 441.

"It is not intended to consider this question at length, and no attempt to gather the cases considering the same has been made. The question involves an entirely different principle of law than that involved where the purchaser has rescinded or repudiated the contract of purchase for breach of warranty, as in such a case he terminates the contract, and, having terminated the contract, he could not assume the inconsistent position of also seeking damages for its breach, such damages being entirely different from damages which, under special circumstances, may be incident to the rescission of the contract. Where, however, as in the last-cited cases, the purchaser does not rescind the contract, but merely refuses to receive the property tendered by the seller as complying therewith, he does not thereby terminate the contract, and may maintain an action to recover whatever he had paid thereon, as well as for damages growing out of the breach.

"This distinction was made in Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co., 66 Neb. 5, 91 N. W. 863, wherein on this point the court said: 'But it seems to us that in this argument there is a failure to distinguish between a refusal to accept, or a return or offer to return goods not corresponding to the warranty, and a rescission of the contract of sale, and between an action for breach of warranty and one for breach of contract. Such failure renders the argument confusing. In this case, there was a contract between the parties whereby the plaintiff was bound to deliver to the defendant goods warranted to be of a certain

quality. According to the finding of the jury, as performance of its part of the contract, the plaintiff tendered goods of an inferior quality. The defendant had the option to accept them and rely on the warranty, or to refuse them. Its election to adopt the latter course would not necessarily result in a rescission of the contract, nor in a release of the plaintiff from its obligation to perform its part of the contract according to its terms. On its failure thus to perform its part of the contract, there resulted a breach of contract, independent of a breach of warranty, for which it is answerable in such damages as would reasonably be in contemplation of the parties as a result of such breach when the contract was made.'

"On the same subject in Tompkins v. J. & R. Lamb, 121 App. Div. 366, 106 N. Y. Supp. 6, affirmed without opinion in 195 N. Y. 518, 88 N. E. 1133, it was said: 'While there are some *dicta* in the books which give to a vendee, upon an executory sale, the choice between two remedies only, either a breach of warranty, if one exist, or an action upon a rescinded contract, the law is well settled that there is a third right of action which such a vendee may have, to wit, an action for a breach of the contract to furnish the property contracted for. In that case, the property attempted to be furnished is rejected as not in accordance with the contract. In an action as upon a rescinded contract, the vendee can recover only the purchase price paid; in an action, however, as for a breach of contract, the vendee is entitled to recover the value of his contract, which includes not only the purchase price paid, but also the worth of his contract over and beyond such purchase price.' "

See, also, *First Church etc. v. Southern S. & C. Co.*, 76 Wash. 367, 136 Pac. 127; *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550; *Harrild v. Spokane School Dist.*, 112 Wash. 266, 192 Pac. 1. This rule distinguishes the cases: *Baker v. Robbins*, 51 Wash. 467, 99 Pac. 1; *Northern Mercantile Co. v. Schultz*, 56 Wash. 393, 105 Pac. 850; *Dickinson Fire etc. Co. v. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087; *Noble v. Olympia*

Brewing Co., 64 Wash. 461, 117 Pac. 241, 36 L. R. A. (N. S.) 467; *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418; *Thompson v. Rhodehamel*, 71 Wash. 24, 127 Pac. 572; *Holt Mfg. Co. v. Strachan*, 77 Wash. 380, 137 Pac. 1006; *Connor & Groger, Inc. v. Forest Mills etc.*, 108 Wash. 468, 184 Pac. 319.

Exceptions were taken to the refusal of the court to give certain requested instructions and to the giving of certain instructions and to the admission and exclusion of evidence. We find no sufficient merit in any of these exceptions to warrant reversing the case. If, in the narrow and technical sense, some minor errors may have crept into the trial of this case, which was protracted and involved and called for so much expert testimony, not one of them was prejudicial or sufficiently important to entitle appellant to a reversal. The judgment is affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16140. Department One. January 24, 1921.]

THE STATE OF WASHINGTON, *on the Relation of The City of Toppenish, Respondent,* v. PUBLIC SERVICE COMMISSION, *Appellant.*[1]

RAILROADS (31)—CONSTRUCTION AND MAINTENANCE—CROSSING HIGHWAYS—POWERS OF PUBLIC SERVICE COMMISSION—STATUTES. Under Rem. Code, § 8733-2, providing that highways shall not cross any railroad at grade without authority from the public service commission, and Id., § 8733-3, providing that the commission shall order a grade crossing if it is impracticable to cross above or below grade, the commission may only determine the kind of crossing to be established, where a city, under the power conferred by Rem. Code, § 7671-14, to open streets, has decided that there shall be a crossing.

MACKINTOSH, J., dissents.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered May 17, 1920, upon findings in favor of the plaintiff, reversing upon certiorari an order of the public service commission. Affirmed.

The Attorney General and *R. M. Burgunder, Assistant,* for appellant.

D. H. Bonsted, for respondent.

PARKER, C. J.—This is an appeal by the public service commission from a judgment of the superior court for Yakima county reversing its order, denying a petition of the city of Toppenish for the establishment of a grade street crossing over the right of way and tracks of the Northern Pacific Railway Company in that city.

There is no serious controversy as to the existence of the facts which we regard as decisive of the case. They may be summarized as follows: Toppenish is a

[1]Reported in 194 Pac. 982.

city of the third class, in Yakima county. The right of way and tracks of the Northern Pacific Railway Company run through the city in a direction which, for present purposes, we may assume as east and west, dividing the city into two parts of about equal size, both as to territory and population. The city has a population of about three thousand, and is a thriving trade center of a large and prosperous agricultural community.

The business and public institutions of the city seem to be, in numbers, approximately equally divided between the north and south sides of the railway. There are in the city but two street crossings of the railway, being the only public ways of travel between the north and south sides of the railway. One of these, Toppenish avenue, crosses the railway at grade practically in the center of the business district of the city, over which there is a large amount of traffic which, during the business hours of the day, at times becomes considerably congested; a tally of such traffic upon a typical business day showing 4,387 pedestrians, 558 automobiles and 590 teams, passing over the crossing.

Two thousand feet west of this crossing is the other crossing, near the western limits of the city. The railway company's passenger depot, and its freight depot, and apparently most of its switching or passing tracks, are east of the Toppenish avenue crossing. While there are as many side tracks west of that crossing, they seem to be for the most part such as may properly be designated as industrial or loading tracks—that is, side tracks for the loading of cars direct from motor and horse drawn vehicles; there being a large amount of such loading of cars by reason of the nature of the agricultural products shipped from Toppenish. Beech street is parallel with and five hundred and sixty feet

west of Toppenish avenue, and extends both to the north and to the south of the railway right of way; but has never been extended or opened for travel across any part of the company's right of way, which at that point is five hundred and ninety feet wide; within which width there are two main line tracks, and six side tracks.

In March, 1919, the city council duly made and adopted an order evidencing its decision that Beech street should be extended and opened for travel across the right of way and tracks of the railway company so as to connect the existing northern and southern portions of that street, and directing the mayor of the city to petition the public service commission for the establishment of a grade crossing of the right of way and tracks of the railway company along the projected line of Beech street. Soon thereafter the mayor filed a petition accordingly with the public service commission. The matter was set down for hearing before the commission; the railway company being notified, filed its answer to the petition of the city, admitting in substance the impracticability of an overhead or under crossing, and denied the necessity of the establishment of a grade or any other crossing upon the projected line of Beech street. The matter being submitted to the public service commission for final decision, upon the evidence produced before it, resulted in findings and an order by the commission the language of which, in so far as we need here notice its terms, is as follows:

"That it is not practicable to cross the railroad either above or below grade, both on account of the excessive cost and the physical obstacles to be overcome.

"There was a conflict of testimony as to the necessity for the opening of this crossing, and while the weight of that testimony may be in favor of the applicant we believe that that is outweighed by the danger-

ous condition of the proposed crossing, and other considerations. Believing, therefore, that the granting or refusal of grade crossing applications rests largely in the discretion of the commission, and from the foregoing findings the commission makes the following

"ORDER

"It is hereby ordered that the application of the city of Toppenish in the above entitled matter be and the same is hereby denied and the proceedings dismissed."

Thereafter the city caused the proceeding to be removed to the superior court for Yakima county by a writ of review, as provided by Rem. Code, § 8626-86, seeking a reversal of the order of the commission and an order from the court that the commission be required to make its order granting the right to the city to have established and maintained a grade crossing as prayed for by it. The matter being heard in the superior court upon the record of the proceedings had before the commission, including all of the evidence introduced before the commission, and being submitted to the court for final decision upon the merits, counsel for the city, the commission, and the railway company appearing, judgment was rendered by the court as follows:

"It Is Ordered, Adjudged and Decreed, that the order of the public service commission of Washington, dated the 26th day of January, 1920, dismissing the petition of relator, city of Toppenish, be and the same is hereby, vacated and set aside, and

"It Is Further Ordered, Adjudged and Decreed, that the public service commission of Washington and the individual members thereof and each of them, be, and they are hereby ordered and directed to make and enter an order herein granting and allowing the petition of the relator, the city of Toppenish, to construct a grade crossing across the tracks of the Northern Pacific Railway at the point described in its petition."

This is the judgment appealed from, and here sought to be reversed.

Our problem is stated in the beginning of the brief of counsel for the commission as follows:

"The appeal is taken to secure a construction by this court of the provisions of the grade crossing law, particularly of §§ 2 and 3 of Chapter 30, laws of 1913, being §§ 8733-2 and 8733-3, Rem. 1915 Code. The specific question to be decided is whether the public service commission, in the exercise of its discretion and judgment, may deny a petition of a city to extend one of its streets at grade over the tracks of a railroad company where it is determined that a grade crossing would be dangerous, and that an over or under crossing is not practicable."

Sections 8733-2, 8733-3, in so far as here seems necessary to notice their language, read as follows:

"All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by *passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so.* All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by *passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so.* . . . . *In determining whether a separation of grades is practicable, the commission shall take into consideration* the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades: the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry."

"Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below

grade, and *whenever* the county commissioners of any county, or *the municipal authorities of any city or town,* or the state officers authorized to lay out and construct state roads, *desire to lay out or extend any highway across any railroad at grade,* they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving such petition the commission shall immediately investigate the same, . . . The evidence introduced shall be reduced to writing and be filed by the commission. *If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing.* The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. If upon investigation the commission shall find that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of changing and deflecting the highway as proposed for the purpose of securing an over-crossing, under-crossing, or safer grade crossing."

We have italicized the words of these sections which seem to call for particular notice. It is not claimed here that there is any opportunity for "deflecting . . . . the proposed highway"—that is, the estab-

lishment of the proposed crossing elsewhere, so as to make a safer grade crossing; and, as already noticed, neither is an over-head or under-crossing practicable at Beech street, because of the excessive cost and the physical obstacles. So the question is, in its last analysis; do these facts authorize the commission to entirely prevent the establishment of any crossing at Beech street by its refusal to grant the privilege of establishing a grade crossing there as proposed?

Now it seems to us that a critical reading of all these statutory provisions can lead only to the conclusion that the commission is not therein given power to decide whether or not there shall be any crossing, but is only given the power to decide what kind of a crossing shall be established. It is true that we find in Rem. Code § 8733-2, the words, "highways . . . . shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so." But this does not mean that it is not the duty of the commission to grant such authority when it is found impracticable to construct a crossing above or below the grade of the railway, the proper authorities having decided that there shall be a crossing at the place proposed. The concluding words of that section strongly suggest that the question to be determined by the commission is only whether or not "a separation of grades is practicable," and not whether or not there shall be any crossing. However, we have in the next section a mandatory provision that

"If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing."

We have noticed that Toppenish is a city of the third class. By turning to Rem. Code, § 7671-14, defining

the powers of such cities and their councils, we find that they have power to "(c) . . . establish, lay out, alter, keep open, open, widen, vacate, improve, and repair streets . . ." Having in mind, in addition to these considerations, the well established rule that public bodies of the nature of our public service commission are bodies with limited powers and jurisdiction, possessing only such as the law expressly gives them, or are by clear inference necessary to the exercise of such powers as are clearly given them, and also the fact that municipal and county authorities are the most common agencies of the state in the exercise of its power to lay out and establish highways, we cannot escape the conclusion that, since the city authorities have decided that this crossing should be established, and being impracticable as found by the commission to establish it as an overhead or under-crossing, and there being no opportunity for making it safer by establishing it elsewhere, it becomes the plain duty of the commission to enter its order permitting the establishment of the crossing as a grade crossing as decided by the superior court.

Contention is made in the commission's behalf rested upon Rem. Code, § 8733-4, providing for the change or discontinuance of existing highway grade crossings over railways. The argument is that, immediately upon the establishment of this grade crossing, proceedings may be instituted looking not only to its change of location, but looking even to its discontinuance. A somewhat persuasive argument is possible to be made upon the provisions of this section, such as might make the provisions of the two preceding sections mean that the decision of the question of whether or not there shall be any crossing rests in the discretion of the commission. However persuasive such argument may be,

we think it could not be legitimately carried to the extent of overriding the plain mandate of § 8733-3, that

"If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing."

We think that the proceeding for discontinuance or change of an existing crossing under § 8733-4, is so separate and apart from the proceedings for the establishment of a crossing under § 8733-2-3, that the force of the plain mandatory language of the former should not be considered as being impaired by the language of the latter. Besides it is conceivable that the dangers of an existing crossing are by actual experience demonstrable with much more certainty than the prospective dangers of a proposed crossing. It may be that the action of a city council in establishing a crossing might be so arbitrary and capricious that their action might be stayed; but such manifestly is not this case. It is but little short of inconceivable that a council of a city of three thousand people, situated as Toppenish is, could be considered as acting capriciously in insisting upon three crossings such as are here contemplated.

It seems to be conceded by counsel for the commission that they have been able to find but one decision of the courts of this country directly in point, as they claim, supporting their contentions here made; and that is *In re Town Board of the Town of Royalton,* 138 App. Div. 412, 122 N. Y. Supp. 844; but, when that decision is critically read, we think it becomes of no controlling force touching our present inquiry; since it was not there a question as to whether or not there should be any crossing, but a question of whether or not there should be a grade crossing or an overhead crossing. The commission decided that it should be an

overhead crossing. There possibly is some room for arguing that such decision of the commission was a prevention of the making of any crossing as proposed, by reason of the great expense of making an overhead crossing. That case, we think, however, decides only that there should be one kind of a crossing instead of another, rather than that there should be no crossing.

We note that Beech street is sixty feet wide to the south of the railway, and eighty feet wide to the north of the railway; and that some buildings of the railway company upon its right of way seem to project into what would be a crossing of the street at a width of eighty feet. This is also possibly true at a width of sixty feet. It does not appear at what width the city proposes to carry the street across the railway company's right of way. We are not here deciding as to whether or not, or to what extent, the city may be compelled to exercise the power of eminent domain and compensate the railway company for the taking or damaging of its property in the ultimate establishing and constructing of the proposed crossing.

The judgment of the superior court is affirmed.

HOLCOMB, FULLERTON, and BRIDGES, JJ., concur.

MACKINTOSH, J., dissents.

[No. 15671. Department One. January 25, 1921.]

JANE H. JOHNSON *et al., Appellants,* v. BURNS LYMAN SMITH, *Respondent.*[1]

NEGLIGENCE (6, 38)—CARE AS TO LICENSEES—ENTRANCE TO BUILDING—EVIDENCE—SUFFICIENCY. It cannot be said as a matter of law that the proximity and similarity of a stairway door and of entrance doors of a large office building were not calculated to mislead and deceive one who attempted to enter the building and fell down the stairway, which commenced but two to four inches from the stairway door, which was mistaken for the entrance door.

SAME (39)—CONTRIBUTORY NEGLIGENCE OF INVITEE. In such a case it cannot be said, as a matter of law, that one is guilty of contributory negligence in falling down the stairs, where the first step through the door would land one not on a platform but on the descending stairs.

Appeal from a judgment of the superior court for King county, Reynolds, J., entered November 7, 1919, dismissing an action for personal injuries, notwithstanding the verdict of a jury rendered in favor of the plaintiff. Reversed.

Vince H. Faben, for appellant.

Earl G. Rice and *Lloyd R. Savage,* for respondent.

BRIDGES, J.—Suit for personal injuries. There was a verdict for the plaintiff in the sum of four thousand dollars. Before entry of judgment thereon, the defendant's motion for judgment notwithstanding the verdict was granted, and judgment was entered dismissing the action. The plaintiff has appealed from this judgment.

The L. C. Smith 42-story building is located at the northeasterly corner of Second avenue and Yesler way, in Seattle. Near the center of the Second avenue side of the building, are two large stone or marble columns,

[1]Reported in 194 Pac. 997.

extending flush with the sidewalk. The evidence does not show the distance between these columns, but, judging from the maps and pictures, it must be some eighteen or twenty feet. The main Second avenue entrance to the building is between these two columns. Standing on the sidewalk and looking east at this portion of the building, one will see four storm doors commencing at or near the north stone or marble column, and extending about two-thirds of the way to the southerly column. Next to the south of these four doors is a casement or window the lower half of which is of wood or metal and the upper half of which is of glass. This window is about two feet in width and somewhat narrower than the doors. Immediately south of the window is another storm door. All of these doors were made in the same manner and one looked substantially like another. Above all the doors, as well as the stairway window, were large glass windows. This whole entrance was constructed mostly of glass with a view of letting in as much light as possible. The four doors immediately to the north of the window lead directly into the vestibule which takes one to the elevators. The window looks into a part of a stairway leading from the sidewalk to the basement, and the south door opens upon this stairway. All of these doors and the windows are on a line and are set back from the sidewalk some two feet. Near the bottom of the stairway is a stone platform at the end of which is a door leading into the basement of the building. On the doors entering the corridor, the word "Pull" is painted in plain letters; on the door leading into the stairway there is no inscription. At all times prior to the injury sued for, it had been customary to leave unlocked the door leading from the sidewalk to the stairway, but to keep locked the door at the bottom of the stairway.

The basement was used exclusively for paint shops, carpenter shops and other similar uses made by the owner of the building. On either side of the entrance thus described, are stores having windows and doors on Second avenue.

Relative to the injury and the manner in which it occurred, there was testimony to go to the jury showing the following facts: The appellant, a few minutes before noon of the 7th day of December, 1918, took a street car at some point on Second avenue, north of the Smith building, with the view of coming to that building for the purpose of transacting certain business with one of the tenants who occupied rooms on the upper floors. The street car stopped practically in front of the Smith building, which would be immediately before reaching Yesler way. The appellant left the car and walked around the front of it to the easterly sidewalk of Second avenue, and thence northerly on the sidewalk for a short distance, and when she reached the most southerly door which we have heretofore described, she opened it and fell headlong to the bottom of the stairway and was severely injured. When she opened this door, she thought she was opening one of the doors leading into the main vestibule. The edge of the first rise of the stairway is but two to four inches inside of this door—in other words, the descent of the stairway starts almost immediately from the door. The day was bright and the vestibule and stairway were reasonably light.

The chief questions are whether the appellant was guilty of negligence, as a matter of law, in mistaking the stairway door for a part of the entrance into the main corridor, and whether there was sufficient testimony to take the case to the jury on the question whether respondent was negligent in maintaining the

unlocked stairway door. Such are the facts here that probably an answer to the first question would be an answer to the second.

It is fundamental that all persons having occasion to enter a building of this character on legitimate business have an implied invitation from the owner of the building for that purpose, and such owner owes a duty to all such persons, which carries with it the obligation to exercise reasonable care and prudence to provide a reasonably safe and suitable entrance, and that such entrance and the approach thereto must be so constructed and maintained that visitors will not be liable to step into dangerous pitfalls by reason of misleading doors or deceptive landings. *Foren v. Rodick,* 90 Me. 276, 38 Atl. 175, and cases there cited.

It seems to us that appellant, in entering the stairway door, might well, under the facts shown in this case, have mistaken that door for the main entrance to the corridor. As we have shown, this door is almost identical with the main corridor doors, and there was practically nothing to indicate that it was not a part of the corridor doors, except the narrow window between it and those doors. It is not for us to decide whether the respondent was guilty of negligence in maintaining these doors as it did or whether the appellant was guilty of negligence in mistaking the door as she did. It is only for us to determine whether there was evidence sufficient to go to the jury on these questions, and we feel confident that there was such.

Most of the cases relied on by the respondent and which, it is asserted in the briefs, influenced the lower court to its action are cases where persons have fallen into stairways located in storerooms or depots. Such is the case of *Dunn v. Kemp & Hebert,* 36 Wash. 183, 78 Pac. 782. There we held that a customer who fell

down a well lighted stairway located in a storeroom, and which stairway was protected on all sides except the entrance, was guilty of negligence and could not recover. To the same general effect are the following cases: *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N. W. 362; *Johnson v. Ramberg*, 49 Minn. 341, 51 N. W. 1043; *Accousi v. Stowers Furniture Co.*, 87 S. W. (Tex. Civ. App.) 861.

In the case of *McNaughton v. Illinois Cent. R. Co.*, 136 Iowa 177, 113 N. W. 844, the facts were that in defendant's depot there were, among others, two doors, one labeled "Basement" and the other labeled "Toilet." The plaintiff mistakenly opened the basement door, thinking she was opening the door to the toilet, and fell down the stairway and was injured. It was held that she could not recover.

In the case of *Illinois Cent. R. Co. v. Sanderson*, 175 Ky. 11, 192 S. W. 869, L. R. A. 1917 D 890, it was held that a person who, without looking, pushed through a door partly open, into a dark hallway leading to the basement of the depot, thinking it a door to the toilet, and fell and was injured was guilty of contributory negligence and could not recover. To the same effect are the cases of *Lehman v. Amsterdam Coffee Co., supra; Speck v. Northern Pac. R. Co.*, 108 Minn. 435, 122 N. W. 497, 24 L. R. A. 249, cited by respondent.

The respondent also relies on the case of *Hollenbeck v. Clemmer*, 66 Wash. 565, 119 Pac. 1114, 37 L. R. A. (N. S.) 698, 2 N. C. C. A. 530. There we held that the mere fact that one step down is maintained at a side exit of a moving picture theatre is no evidence of negligence, where the exit was properly lighted.

But with relation to the storeroom stairway cases, this court has denied recovery only where the stairway was in such plain view of the injured person as, had he

paid but the slightest attention, he must have seen it. We have permitted recovery in all cases where the stairway was dangerously located or was unprotected or was poorly lighted, or tended to form a trap. *Stone v. Smith-Premier Typewriter Co.*, 48 Wash. 204, 93 Pac. 209; *Emmons v. Charlton & Co.*, 63 Wash. 276, 115 Pac. 163; *Driscoll v. Devenere*, 110 Wash. 307, 188 Pac. 408.

It seems to us, however, that there is a clear distinction between cases relied on by respondent and the facts of this case. It is quite usual, if not necessary, for there to be stairways in large storerooms which either lead to a higher floor or to the basement, and if such stairways are properly lighted and are not placed in peculiarly dangerous locations and are in plain view, it should be held that there is no negligence in maintaining them. All persons must realize that such stairways exist and they cannot blindly go into them and then seek recovery. So, also, in the depot cases cited by respondent. In all the main waiting rooms there must necessarily be many doors, and, usually, among the rest, one leading to the basement. Of this fact all persons must take notice and they have no right to assume that they will be perfectly safe in entering any of such doors.

But in this case we find an entirely different situation. Here the door which the appellant mistook for the main corridor doors, to all intents and purposes, looked like those doors. The very resemblance of the doors and their proximity, were calculated to mislead and in this instance did actually mislead. Had the stairway door been at some considerable distance from the entrance doors, we would have a very different situation and case. But it was separated from those doors only by a two foot window, which itself had consider-

able resemblance to the doors. Under these circumstances it cannot be said, as a matter of law, that the situation was not calculated to mislead or deceive.

In our opinion, this case is controlled by the principles of law laid down in the case of *Clopp v. Mear,* 134 Pa. St. 203, 19 Atl. 504. The facts there were that a certain store had two entrances, the doors of either of which were practically the same. Between these two doors or entrances was a show window. Within the storeroom, immediately in front of the southerly entrance, was a hoist which, at the time, was open. When it was closed, it was flush with the floor. The northerly door was intended for an entrance by customers. The southerly door was intended to be used only by persons connected with the store and was generally kept locked, but at the time in question it was unlocked. The plaintiff in the case, seeing something in the show window she desired to purchase, opened the southerly door and at once stepped into the hole in the floor. The court held that she was entitled to recover. In fact, the case was so clear to the judge writing the opinion that he said:

"In view of the evidence, this was not only a clear case for submission to the jury, but it was scarcely possible for them to come to any other conclusion than that the defendants were chargeable with negligence in leaving the hatchway open and unguarded and thereby causing the serious injury that was sustained by the plaintiff."

Another case closely resembling the one at bar is *Foren v. Rodick, supra,* where the facts were as follows: the building in question had a first and second story; the first floor was devoted entirely to business enterprises and was divided into several stores, and the second floor was leased for offices. The court, in its opinion, stated the remainder of the facts as follows:

"The main entrance to the stairway leading to the second floor is from Cottage street, about midway of the length of the building. It is about four feet in width, and is closed by double doors opening inward to a short landing at the foot of the staircase. Twenty-two and one-half inches at the left of these doors, as one faces the building, and at the same height from the sidewalk, is a single door opening from the sidewalk inward to the cellar."

The plaintiff, desiring to go to the second floor of the building, mistook the cellar doorway for the main entrance and was injured. The court held that the defendant was negligent in maintaining this cellar door unlocked in such close proximity to the main entrance to the stairway, and that the plaintiff was not negligent in mistaking it for the stairway door.

In the case of *Gordon v. Cummins,* 152 Mass. 513, 25 N. E. 978, 23 Am. St. 846, 9 L. R. A. 640, the facts were that the plaintiff was injured by falling into an elevator well which communicated directly with the street by an opening provided with a sliding door and chain which guarded it. Separated from the opening by a granite post a foot wide, was an open doorway of about the same size and construction and on the same level with the street, which led to the common entry of the building. At the time of the accident, the elevator opening was not protected by the chain and the plaintiff mistook it for the open doorway. The court said that the plaintiff "had a right to suppose that, when seeking to enter where he had a right to go, he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and uninclosed by any barrier at a time when it was not in use."

In the case of *Hayward v. Merrill,* 94 Ill. 349, 34 Am. Rep. 229, the facts were as follows: the plaintiff was a

guest of a certain hotel and had been assigned to room No. 38. Adjoining that room on the same side of the hall, was a door which resembled the door of his room, only two and one-half feet distant and connected with the elevator well. The doors of the plaintiff's room and of the elevator were numbered 38 and 40, respectively. The plaintiff, thinking he was entering his room, opened the door to the elevator well and, stepping in, fell to the basement. The plaintiff was permitted to recover. The court said:

"The proprietor of a hotel to which he invites the public to come, that he may make gains thereby, has no right to permit the existence of such an opening as this one was, unless suitably guarded, that the slightest mistake on the part of the guest might not prove fatal. Had the plaintiff been intent on observing the number on the room door he might have discovered the room he wished to enter, but by the merest accident he opened the next door, and this slight inattention was the cause of his severe injuries. The opening ought to have been better protected than it was."

It cannot be said, as a matter of law, that the appellant was guilty of negligence in mistaking the stairway door for one of the doors leading into the main corridor, and from this conclusion it must follow that we cannot say, as a matter of law, that the respondent was not guilty of negligence in maintaining this door in the manner it did.

The only other question to be considered is whether the appellant was guilty of such contributory negligence, after having mistaken the entrance door, as to bar recovery by her. The testimony shows that the starting of the stairway is practically flush with the door; that is, the first step through the door would land one, not on a platform, but on the descending stairs. The appellant testified that as soon as she opened the door she stepped in and immediately fell, and that she

had no opportunity, after stepping in, of looking about her and to see the stairway in front of her. Had there been a landing inside the door upon which the appellant would have stepped prior to starting down the stairs, then it might be held that she would have been guilty of negligence in not seeing the conditions in front of her; but, under her testimony, she had no opportunity to observe, and therefore she cannot be said to be guilty of negligence as a matter of law for not having observed the stairway. There was ample testimony on this question to require the case to be submitted to the jury.

Our conclusion, therefore, is that the court erred in granting judgment of dismissal notwithstanding the verdict.

The court, having granted the motion for judgment notwithstanding the verdict, did not make any ruling on respondent's motion for a new trial. The case is reversed and remanded with directions to set aside the judgment notwithstanding the verdict and to consider and act upon the motion for a new trial.

Parker, C. J., Mackintosh, Fullerton, and Holcomb, JJ., concur.

[No. 15885. Department One. January 25, 1921.]

L. TEWELES SEED COMPANY, *Appellant*, v. FRANK M. FAIRBANKS *et al.*, *Respondents*.[1]

SALES (113)—WARRANTIES — BREACH — WARRANTY OF QUALITY. Findings that peas complied with a contract calling for Canadian yellows of "good stock, in good merchantable condition" are not sustained, where many samples were taken from the shipment and all the witnesses admitted that the samples did not comply with the contract as to quality, kind or condition.

SAME (164)—REMEDIES OF BUYER—EVIDENCE—ADMISSIBILITY. Upon an issue as to the quality of peas, the trade custom to have samples taken by a disinterested person is not exclusive, and does not prevent an interested party from taking samples.

SAME (165)—REMEDIES OF BUYER—DAMAGES—DIFFERENCE BETWEEN PRICE PAID AND MARKET VALUE. Where defective peas shipped from Seattle could not be examined until their arrival at Milwaukee, and were rejected, held subject to the shipper's order, and finally sold on the open market in Milwaukee for what they would bring, the measure of the buyer's damages is properly based upon the market price at Milwaukee.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 2, 1919, upon findings in favor of defendants, dismissing an action on contract, tried to the court. Reversed.

Lucas C. Kells, for appellant.

J. Grattan O'Bryan, for respondents.

BRIDGES, J.—A contract for the sale by the defendant to the plaintiff of certain peas, was embodied in the following communications:

Seattle, April 19, 1918.

L. Teweles Seed Co.,
Milwaukee.

For immediate telegraphic acceptance offer sell two cars choice stock Canadian yellows five three quarters fob cars here certified weights immediate shipment. F. M. Fairbanks & Co.

[1]Reported in 195 Pac. 40.

Milwaukee, 4-20-18.

F. M. Fairbanks & Co.,
Seattle, Wash.
Five fifty utmost can pay. L. Teweles Seed Company.

Seattle, April 20, 1918.

Teweles Seed Co.,
Milwaukee, Wis.
We accept five and half fob cars Seattle Canadian yellow peas providing you accept three cars about forty tons each immediate shipment from Seattle certified weights usual terms. Wire reply quick.

F. M. Fairbanks & Co.

4-22-18.

F. M. Fairbanks & Co.,
Seattle, Wash.
We booked the three cars. Be sure quality is satisfactory. If any more to offer advise. L. Teweles Seed Co.

CONTRACT CONFIRMATION.

Seattle, Wash., April 22, 1918.

L. Teweles Seed Company,
Milwaukee, Wis.
Gentlemen:
We confirm sale to you today of 3 cars Canadian yellow peas at 5½c per pound, f. o. b. Seattle for immediate shipment, weights certified. Payment demand draft against bills of lading. Remarks: Peas to be good stock in good merchantable condition.

Yours truly,
F. M. Fairbanks & Co.,
Per F. M. Fairbanks.

Accepted: L. Teweles Seed Company,
By Max Teweles.

Pursuant to this contract, and within a few days after it was made, the defendant loaded three cars with peas, all of them being in sacks supposed to weigh 125 lbs. each. In one car were 650 sacks, in another 660 and in a third 690, making in all 2,000 sacks. The cars thus loaded were shipped by the usual bills of lading to Milwaukee, the place of business of the plaintiff. All these bills of lading with drafts attached were forwarded by the defendant to a bank in Milwaukee, which

collected from the plaintiff the amount of the drafts and surrendered to it the bills of lading. Within a few days thereafter, the cars reached Milwaukee, where, for the first time, the plaintiff examined the peas and claimed they were not in accordance with the contract. It claimed to have found in the three cars 291 sacks of inferior peas. It accepted the remainder of the peas as complying with the contract. It notified the defendant of the defective condition of the peas and told him they were in Milwaukee for his disposal. The defendant did not take any action in this regard, and the plaintiff sold the peas which it claimed were defective on the open market at Milwaukee for an amount considerably less than it had paid therefor.

It made up its claim against the defendant in the following manner: It charged him with $14,851.10, being the amount of the drafts paid, and credited him with $13,999.05, being the combined purchase value of the peas accepted as complying with the contract and the amount received for the defective peas, thus leaving a difference of $852.05, for which amount it later sued the defendant. The case was tried to the court without a jury. There were findings in favor of defendant and a judgment dismissing the action. The plaintiff has appealed.

The appellant claims that it bought from the respondent "choice Canadian yellow peas." The respondent contends that he sold "good peas, in good merchantable condition." It is true the telegrams exchanged between the parties were with reference to choice peas, but these telegrams were only preliminary to the final agreement or letter signed by both the parties, and dated April 22. That instrument was the final contract of the parties, and it expressly provided that the peas were to be of "good stock, in good merchantable condition."

The chief contention between the parties to the trial was whether the respondent had shipped to appellant peas of "good stock, in good merchantable condition." Appellant offered much evidence tending to show that many of the sacks of peas were not such as were contracted for; that some of them were musty, discolored and split; that others were not Canadian yellow peas at all; that the whole shipment contained much dirt and screenings; that in one car there were 2,190 lbs. of dirt and screenings beside 106 sacks of inferior peas; that in another car there were 68 sacks of inferior peas and more than 2,200 lbs. of dirt and screenings; that in the third car there were 117 sacks of poor peas and 2,300 lbs. of dirt and screenings.

At the trial in Seattle, the appellant produced many samples of defective peas which it testified were taken in the usual manner from each sack of defective peas. Practically all the witnesses, either for the plaintiff or defendant, admitted that the peas shown in the samples did not comply with the contract. But respondent contends that the samples were not taken from the peas which he had shipped. He had no other proof of this assertion than that he had not shipped any such peas. The court, however, found that the samples used at the trial were taken from the sacks of peas which the defendant had shipped.

We have very carefully read the testimony, and while we realize that it is our duty to give favorable consideration to the findings of the trial court, we are unable to agree with those findings because, to our mind, they are clearly against the preponderance of the evidence. It would not serve any useful purpose for us to recite the testimony in detail. Suffice it to say that we are fully convinced that many of the peas were discolored, split and musty; that they contained

an undue quantity of dirt and screenings; that some of them were not "Canadian yellow peas;" that many of the sacks contained peas of very inferior quality, and that those which appellant rejected were neither "good peas," nor "in merchantable condition." It seems to have been proven almost beyond controversy that the samples used at the trial were taken from the sacks shipped by respondent, and the trial court so found, but no witness, not even the respondent himself, contended that the samples complied with the contract.

Respondent claims that the custom of the trade is to have the chamber of commerce or some other disinterested person take the samples. But that custom, if it exist, is not exclusive. There is no reason why appellant should not take the samples. This it appears to have done in the usual manner by removing from each sack of defective peas, a small portion of the contents. Practically all the testimony shows that these samples were taken in a fair manner. Under all the testimony, we must hold that the peas which appellant rejected did not comply with the contract.

There is some argument in the briefs as to whether the measure of damages should be based on the market price at Seattle or the market price at Milwaukee, of the defective peas. The peas were shipped from Seattle to Milwaukee, the place of business of the appellant. Before they reached that city, appellant had no opportunity to examine them. When it found they were defective, it notified respondent and informed him that it held the peas for his order. Later the appellant did the only thing it could do, and that was to sell the peas in the open market at Milwaukee for the market price at that point. This it had the right to do.

The judgment is reversed and the cause remanded with instructions to the lower court to enter judgment for the appellant in the amount sued for.

PARKER, C. J., HOLCOMB, MACKINTOSH, and FULLERTON, JJ., concur.

[No. 16049. Department One. January 25, 1921.]

C. V. LOCHRIDGE *et al., Respondents,* v. M. NATSUHARA *et al., Appellants.*[1]

LANDLORD AND TENANT (146)—UNLAWFUL DETAINER—DAMAGES AND AMOUNT OF RECOVERY. In an action for unlawful detainer, it is error to include in the judgment for damages, rent for a period of two months during which the defendants were rightfully in possession and for which they had paid the rent.

SAME (146). In an action for unlawful detainer, it is error to include damages for withholding the premises after the trial of the case until entry of judgment, where there was nothing to show that possession was withheld after the trial.

APPEAL AND ERROR (93)—RIGHT TO APPEAL—COMPLIANCE WITH JUDGMENT. Plaintiffs in an action of unlawful detainer are not entitled to dismiss defendants' appeal from the judgment on the ground that possession had been since surrendered and the controversy ended, where plaintiffs' right to possession and the amount of the damages are involved.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 24, 1920, upon findings in favor of plaintiffs, in an action for unlawful detainer, tried to the court. Modified.

Walter A. Keene, for appellants.

Jay C. Allen, for respondents.

BRIDGES, J.—The plaintiffs brought suit under the unlawful detainer statute for the possession of a certain small tract of land in King county. In their com-

[1]Reported in 194 Pac. 974.

plaint they alleged they were the owners of the land, and that in July, 1914, they had made a five-year written lease of the premises to the defendants, which was to expire on the 31st day of August, 1919; that, a short period before the time for the expiration of the lease, they gave an oral extension, at the request of the defendants, for the period of sixty days, which extension would expire on the 1st day of November, 1919; and that the defendants had refused to deliver possession at that time.

The suit was commenced on November 3, 1919, being three or four days after the expiration of the oral extension of the lease. Plaintiffs gave bond for the immediate possession of the property, and the defendants gave a redelivery bond and remained in possession. The case was tried to the court without a jury, and judgment was entered in favor of the plaintiffs against the defendants for possession of the property and for nine hundred dollars damages. From this judgment, the defendants have appealed.

The chief contention between the parties is as to the time for which the extension of the written lease was made. The respondents contend that it was for but sixty days after September 1, 1919, whereas the appellants contend that the respondents gave them an extension of one year, and that such extension agreement had been drawn up and signed by the appellants, but that the respondents had refused to carry out their oral agreement, and had refused to sign the written extension of the lease. They further contend that, relying upon respondents' agreement to extend for the period of one year, they had made extensive improvements on the land, and had gone to considerable expense in making preparations for the continued use of the land, and that because thereof the respondents

should be estopped to deny that they had given the extension for one year.

It would not serve any useful purpose for us to follow the testimony in detail. There is a very sharp and decided conflict. The trial court, who had the witnesses before it, found for the respondents upon the facts. A reading of the record fails to convince us that such findings are against the weight of the evidence. We are, therefore, content with the findings made by the court on the questions of fact.

Appellants contend that the judgment for nine hundred dollars damages is excessive, and with this contention we agree. While the respondents introduced considerable testimony concerning the amount of their damages, the trial court apparently adopted the monthly rental value of the property as the measure of respondents' damage. It appears from the court's findings that the agreed rental for the two months' extension was sixty dollars a month. The fourth finding of the court is as follows:

"That the rental from said property was $60 per month, and the court finds that the plaintiffs have been damaged by being kept out of possession thereof in the sum of $60 per month for each and every month commencing September 1, 1919."

From these findings, the court concluded:

"That the plaintiffs have been damaged in the sum of $60 per month from the first day of September, 1919, or seven and one-half months, at the rate of $60 per month, amounting to $450, which said damage will increase monthly at the rate of $60 per month and they are now entitled to judgment against the defendants in the sum of double the amount of said damages, to wit, $900, together with the costs and disbursements of this action."

The amount of damages awarded by the judgment was based on these findings and conclusions. It will

thus be seen that the trial court fixed the damage at the rate of sixty dollars per month from the termination of the old lease, to wit, September 1, 1919, to the date of the judgment. The plaintiffs, however, plead and the court found that there had been an extension of the lease for the period of two months, or until November 1, 1919, consequently the appellants were rightfully in possession during the months of September and October. The testimony also shows that respondents paid their rental for those two months. It was, therefore, error for the court to include in his judgment any sum for those two months. Its judgment, however, did fix the damage for those two months at one hundred and twenty dollars, which, doubled under the statute, would make two hundred and forty dollars, which amount formed a part of the judgment. This was erroneous.

Appellants further contend that the court erroneously gave judgment for damages from the time of the trial of the case to the time of the entry of the judgment. It appears that this case was tried on the 22d and 28th days of January, 1920, and the judgment was made on the 24th day of April, 1920. There is nothing in the record to show to the court that the appellants retained possession of the property after the trial. There was no supplemental complaint nor was there any supplemental testimony taken before the entry of the judgment or at all after the trial. For all the court may have known, the appellants may have surrendered possession of the property to the respondents immediately after the trial of the case. It was, therefore, error to include in the judgment any damages subsequent to the trial of the case. The only damages shown by the record to which the respondents are entitled would be the sum of sixty dollars per month from the 31st day of October, 1919, to the time of the

trial, which would be three months, or one hundred and eighty dollars, which amount doubled as provided by the statute, would be three hundred and sixty dollars. If the respondents are entitled to any damages subsequent to the time of the trial, they must be recovered in some other action, since there was no effort to recover them in this.

The respondents cite authorities to the effect that the damages will not be doubled, as provided by the statute, unless claim therefor is made in the pleadings. These authorities are not in point here for the reason that the prayer of the complaint expressly asked for double damages.

The respondents have moved to dismiss the appeal on the ground that the question as to the right to possession is at this time a moot one. The respondents in their brief contend that the appellants surrendered possession after the expiration of their supposed one year's extension, to wit, October 31, 1920. It may be true that, at the time of the hearing here, the appellants had surrendered possession of the premises and that the question of restitution at this time is not involved, but the appellants' right to possession is involved, as is also the question of damage which they must pay for any wrongful possession. There is no merit in the motion to dismiss.

The judgment is modified so that respondent will recover the sum of three hundred and sixty dollars. Appellants will recover the costs of the appeal.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16050. Department One. January 25, 1921.]

F. M. BARTON *et al., Appellants,* v. THE CITY OF SEATTLE, *Respondent.*[1]

MUNICIPAL CORPORATIONS (566)—CLAIMS—SUFFICIENCY OF NOTICE—RESIDENCE OF CLAIMANT. A claim for personal injuries against a city of the first class must give the address of the claimant for the six months immediately prior to the time the right of action accrued, as required by Rem. Code, §§ 7995 and 7997, and it is not sufficient to give the address at the date of presenting the claim.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 19, 1919, upon a trial to the court and jury, granting a nonsuit, in an action for personal injuries. Affirmed.

John F. Murphy, for appellants.

Walter F. Meier and *Frank S. Griffith,* for respondent.

BRIDGES, J.—Plaintiffs have appealed from the judgment of the lower court dismissing their action against the city of Seattle, wherein they sought to recover damages because of personal injuries to the plaintiff Martha J. Barton, received on April 8, 1919. The only question involved here is the sufficiency of the notice given by the appellants to the city of the injury to Mrs. Barton. The case was dismissed because the notice did not state the residence of the claimants or either of them, for six months immediately prior to the time the claim for damages accrued.

The charter of the city of Seattle provides that all claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time such claim for damages accrues, and that no action shall be maintained against the city

[1]Reported in 194 Pac. 961.

for such damages until such claim or notice has been filed. Rem. Code, § 7995, provides that, whenever a claim for damages against any city of the first class shall be presented and filed,

"Such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued."

Rem. Code, § 7997, is to the effect that "compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claim for damages." The notice given to the city gave the residence of Mrs. Barton at the time of the filing of the claim, but did not give her residence for the preceding six months.

This court has on many occasions had this statute before it, but only in one or two cases has the exact question here presented been involved. We have held that this statute should be liberally construed, and that a part of its purpose was to put the city in position to make investigations, and that when the notice is of such character as to accomplish these purposes it is sufficient. *Frasier v. Cowlitz County,* 67 Wash. 312, 121 Pac. 459; *Lindquist v. Seattle,* 67 Wash. 230, 121 Pac. 449, and cases there cited. We have also held that, where there has been a *bona fide* attempt to comply with the city ordinance or statute with reference to notice, and nothing therein is misleading, the notice will be held sufficient. *Lindquist v. Seattle, supra.*

In *Maggs v. Seattle,* 86 Wash. 427, 150 Pac. 612, the notice gave the claimant's residence at the date of the verification thereof, and for at least six months prior thereto, and we held that the notice was sufficient, al-

though it did not state the residence of the claimant at the date of presenting and filing the claim, because the presumption would be that the residence remained the same until the date of filing.

In the case of *Wagner v. Seattle,* 84 Wash. 275, 146 Pac. 621, Ann. Cas. 1916 E 720, we held that a claim which gave the residence of the injured person as number 218 of a certain street in the city of Seattle, was not defective because his actual residence was number 208 of the same street. We there said that there had been a *bona fide* effort to comply with the statute and that the city had not been misled.

In the case of *Collins v. Spokane,* 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840, we held that compliance with this statute is mandatory and a condition precedent to the bringing of the action, and that the giving of the notice in substantial compliance with the statute must be alleged.

In *Hammock v. Tacoma,* 40 Wash. 539, 82 Pac. 893, construing an ordinance requiring the claim for damages to give the place of the injury, we held that a notice describing the injury as having occurred on J street, between 41st street and 42nd street, is sufficient although the injury occurred between 41st street and 43rd street, there being no 42nd street intersection of J street. To the same effect see *Mulligan v. Seattle,* 42 Wash. 264, 84 Pac. 721; *Ellis v. Seattle,* 47 Wash. 578, 92 Pac. 431.

The only two cases out of this court which directly involve the question in this case are *Collins v. Spokane, supra,* and *Connor v. Seattle,* 76 Wash. 37, 135 Pac. 617.

In the *Collins* case the claim or notice presented to the city did not give the claimant's residence at any time. At the trial, he offered to prove that his place

of residence at the time of the injury and for a long period prior thereto was known to the city officials, and that the city had not been misled or injured. We held that such offer should be rejected, saying:

"The statute makes no exception in such cases, and there is nothing in the record to indicate that the appellant was misled by any act of the respondent (city). He merely failed to comply with the statute, and must bear the burden of his own inadvertence."

In the *Connor* case the claim and notice filed with the city contained no reference to the claimant's place of residence at the time of filing the claim, nor his residence for six months immediately prior to the time the claim for damages accrued. Touching this question we said:

"It is plain from a reading of this act that, if it was necessary to present any claim under the provisions of the charter of the city of Seattle in order to maintain such an action as this, then the claim presented was fatally defective."

We think the *Collins* and the *Connor* cases, *supra,* are decisive of the question involved here and must control the disposition of this case. Nor are the *Connor* and *Collins* cases inconsistent with our rulings in the other cases cited by us. The case of *Wagner v. Seattle, supra,* was the one where the address was given as at 218 of a certain street, when, as a matter of fact, the proper address was 208. In that instance it was manifest that there had been an honest attempt to comply with the statute and that the mistake was purely a clerical one and did not mislead. Such is also true of *Maggs v. Seattle,* and *Hammock v. Tacoma, supra.* But here there was an entire failure to give the claimant's residence for six months preceding the accrual of the right of action. There was no attempt to comply with this part of the statute.

To hold that it was not necessary to comply with the six months' provision of the statute would require a holding that it is not necessary to comply with any provisions of the statute with reference to residence and, following this line of reasoning, we would soon entirely wipe out the statute. We have heretofore held that the provisions of the statute requiring the notice to give the residence, both at the time of filing the claim and for six months prior thereto, were reasonable. *Collins v. Spokane, supra.* If the requirement is reasonable, then it must be complied with, because the statute commands that it be complied with. We cannot see our way clear to come to any conclusion other than that the judgment must be affirmed. It is so ordered.

PARKER, C. J., HOLCOMB, MACKINTOSH, and FULLERTON, JJ., concur.

[No. 16220. Department One. January 25, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Albert Davis, Petitioner,* v. THE SUPERIOR COURT FOR LEWIS COUNTY, *W. A. Reynolds, Judge, Respondent.*[1]

VENUE (18)—CHANGE OF JUDGES—RIGHT TO. The change of venue statute is applicable to a proceeding against a father under the juvenile court act to have a child adjudged a dependent child.

SAME (20)—CHANGE OF JUDGES—TIME FOR APPLICATION. After counsel appears before the court and requests a judge to continue a hearing for the convenience of counsel, which was granted, it is too late to seek a change of judges under Rem. Code, §§ 209-1 and 209-2, requiring the application to be made at the time of appearing and before the court has made any ruling in the case.

Application filed in the supreme court November 18, 1920, for a writ of mandate, to compel the superior

[1]Reported in 195 Pac. 25.

court of Lewis county, Reynolds, J., to grant a change of judges. Denied.

W. E. Bishop, for relator.

J. H. Jahnke, for respondent.

BRIDGES, J.—A proceeding was commenced in the Lewis county superior court on the 13th day of November, 1920, entitled, "In the Matter of the Welfare of Irwin Davis, Florence Davis, and Gwendolyn Davis," wherein it was alleged that the Davis children were in the custody and control of one Albert Davis, who was neglecting them and treating them in a cruel and inhuman manner, and that such children were dependent children under the juvenile court act. A summons was issued and served on Albert Davis on the 13th day of November, 1920. The summons or notice required Davis to appear in court on the 16th day of November, 1920, at the hour of 9:30 a. m., and defend himself touching the matter recited in the petition. Thereafter Davis filed an affidavit of prejudice against the presiding judge and asked to have the case transferred to another county, or that another judge be called in to try it. The local judge made an order refusing the change of venue and threatened to proceed with the trial of the case. Thereupon Davis instituted this proceeding, seeking to compel the judge of the Lewis county court either to call in another judge or transfer the case to some other county for trial.

The judge of that county has made his return setting out the facts as he understands them. It does not appear upon what grounds the lower court refused to grant the change of venue, but an examination of the record tends to indicate that he so refused either because the change of venue statute has no application to a proceeding under the juvenile court law, or on

the ground that the application for the change was not timely made, or possibly on both of these grounds.

We have no doubt that the change of venue statute is applicable to a proceeding of this character. While this exact question has not been before this court, yet in a case of similar character the court has applied the change of venue statute. *State ex rel. Mead v. Superior Court,* 108 Wash. 636, 185 Pac. 628.

The parties are not agreed upon the facts or circumstances under which the application for change of venue was made. We will, under these circumstances, adopt the return of the respondent as showing the facts correctly. We have held that, where the return of the judge is controverted, we will accept that return as correctly reciting the facts, where the witnesses are equally divided and reputable. *State ex rel. Russell v. Superior Court,* 113 Wash. 253, 193 Pac. 678; *In re Geissler's Estate,* 99 Wash. 452, 169 Pac. 822.

The substance of respondent's return is that, after the original petition concerning the dependent children had been filed, and after the service upon Albert Davis, in whose custody the children were, and before the time fixed for the hearing of that case, W. E. Bishop, acting as attorney for Davis, appeared before Judge W. A. Reynolds, as judge of the juvenile court of Lewis county and asked that the hearing of the case be continued for the reason that he had important business elsewhere on the day set for the trial; that, complying with the request, the court continued the trial from 9:30 a. m. to 3 p. m. of November 16, 1920; that, after such continuance had been requested and granted, Davis, through his attorney, informed the court that he had filed an affidavit of prejudice and motion for change of judges, and asked the court to grant such motion, which the court refused to do, but,

on the contrary, made an order denying such application. The question is, therefore, whether the application for the change of venue was timely made.

A literal reading of the change of venue statute, being Rem. Code, §§ 209-1 and 209-2, would seem to authorize the application for the change of venue to be made at any time before the entry of judgment, but we have held in many cases that such was not the legislative intent. We have held in several cases that the application for the change of venue must be timely made. *State ex rel. Russell v. Superior Court,* 77 Wash. 631, 138 Pac. 291, and cases there cited.

In the case of *State ex rel. Lefebvre v. Clifford,* 65 Wash. 313, 118 Pac. 40, this court said:

"We cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case,"

and that the application was not timely made.

In the case of *Fortson Shingle Co. v. Skagland,* 77 Wash. 8, 137 Pac. 304, the facts were that a suit for injunction was instituted and a temporary restraining order was made, after a hearing in which the defendants participated. Thereafter, defendants filed an affidavit of prejudice. The court held that the application for change of judge was not timely made.

In the case of *Nance v. Woods,* 79 Wash. 188, 140 Pac. 323, the defendants filed an affidavit of prejudice after they had filed a motion for cost bond and the bond had been furnished, and after they had filed a motion for a bill of particulars, but before it had been heard, and after the plaintiff had filed a motion for default, which, after hearing, was denied. It was held that the motion was not timely made.

In the case of *State ex rel. Deavers v. French,* 78 Wash. 260, 138 Pac. 869, the defendants first filed a motion to make the complaint more definite and certain and several days thereafter, and before this motion had been presented or ruled upon, they filed an affidavit of prejudice against the judge. Held, that the affidavit was timely made.

In the case of *State ex rel. Farmer v. Bell,* 101 Wash. 133, 172 Pac. 221, it was held that, after requesting the trial judge to set a case for jury trial, and such request is complied with, it is too late to file an affidavit of prejudice and demand that the case be assigned to another judge.

In the case of *State ex rel. Dunham v. Superior Court,* 106 Wash. 507, 180 Pac. 481, the prevailing facts were that, after the defendants had moved to make the complaint more definite and certain, and after that motion had been noted for hearing, but before such hearing or any ruling of the court, they made an affidavit of prejudice against the judge and moved for change of judges. It was held that the motion was timely made.

The case of *State ex rel. Farmer v. Bell, supra,* would seem to be particularly decisive of the question involved here. There the only thing which had transpired before the filing of the affidavit for change of venue was the application by the person seeking the change to have the case set down for trial to a jury. If, under these circumstances, the application for change of venue is not timely made, then it certainly cannot be said to be timely made after the complaining party had asked the court for a continuance of the trial and obtained a ruling of the court thereon.

The point we wish to emphasize is that a motion for a change of judges supported by an affidavit of prejudice, is timely made if filed and called to the attention of the court before it has made any ruling

whatsoever in the case, either on the motion of the party making the affidavit or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, otherwise it is not timely made.

We conclude that the affidavit of prejudice and the motion for change of venue in this case came too late. The writ applied for is denied.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16040. Department One. January 25, 1921.]

ED DANIELSON *et al.*, *Appellants*, v. LIBBY, McNEILL & LIBBY, *Respondent*.[1]

SEAMEN (1)—WHO ARE SEAMEN. The fishermen and crew of a fishing boat signing shipping articles come within the designation of seamen and their rights as to wages in case of salvage work are governed by those of seamen.

SEAMEN—RIGHT TO CLAIM SALVAGE. Seamen may not claim compensation for salvage upon abandonment of the ship unless the abandonment was by order of the master.

SEAMEN (2)—SHIPPING ARTICLES—COMPENSATION ON SALVAGE. Under shipping articles providing that the seamen would do such work as was necessary to protect the ship if endangered, without extra compensation, and that no salvage should be earned or paid except after shipwreck or abandonment, seamen are not entitled to salvage for services, where the ship went aground and the seamen, after hazardous work in saving the vessel and cargo, were paid their wages and discharged and the vessel was finally floated and taken to port, never having been abandoned.

Appeal from a judgment of the superior court for King county, Jurey, J., entered April 9, 1920, dismissing an action to recover salvage by seamen, upon sustaining a demurrer to the complaint. Affirmed.

[1]Reported in 195 Pac. 37.

Jay C. Allen (*E. W. Howell,* of counsel), for appellants.

Kerr, McCord & Ivey, for respondent.

MACKINTOSH, J.—The complaint, as aided by a bill of particulars, shows that the respondent is engaged in the fish canning business in Alaska, and in connection therewith operates fishing boats; that, annually before the fishing season opens, it collects at Seattle such men as it requires for fishermen, beachmen, trapmen and seamen, and ships them on the company's vessels to Alaska, where they are used in connection with the canneries there.

The numerous plaintiffs were some of the men so employed by the respondent for the season of 1918, and shipped on board of the respondent's vessel, "W. B. Flint," on April 10, of that year. They each signed a written agreement and shipping articles, which agreement is of considerable length but need be noticed only in the following particulars, so far as this action is concerned. It provides, in section one, that "in cases of emergency such as safety of ships or company's property being in danger, such work shall be done at any and all times without extra compensation." Section 3, provides:

"The time of service shall be from the date of sailing from, until return to Seattle, all on vessels to be designated by the company, except in case of shipwreck or necessitated abandonment of the ship through stress of weather, or lawful discharge, then all wages shall cease at the date of such casualty or discharge, except for such men as are paid for the run; if such disaster occurs before or after the vessel has arrived at its destination in Alaska, these men shall receive the full run money. In addition to run money and all other earnings, salvage work shall be paid for at the rate of One Dollar ($1.00) per hour for all hours

so worked; money so earned to be paid to the individual men doing such work. All men assigned to such abandoned or wrecked vessel to be given free return passage, including maintenance."

Section 25 provides that,

"In case of any assistance rendered to any vessel or property of the Libby, McNeill & Libby Co., no salvage shall be claimed or paid to parties of the second part therefor except as provided in section 3."

When the "Flint" reached Bristol Bay, it encountered floating ice. It was at that time in close proximity to the shore, and when off Cape Chicagof it ran aground and became fast. Unsuccessful efforts were made to get the vessel into deep water. The tides and wind brought the ice against the side of the vessel and stove numerous holes in her hull. Water was made so rapidly that the pumps could not control it, and for several days, at the request of the master, the appellants were at work endeavoring to protect the vessel. Some were at the pumps and others were working in an endeavor to place patches over the holes; some were carrying cargo ashore and bringing back fresh water to the vessel, making the trip over the ice pack. These acts were done under the direction of the master of the vessel and the superintendent of the respondent's plant, who was aboard. The rudder had been lost, the sides of the vessel torn open and she was fast on the shoals. In this condition the vessel remained for nine days, when one of the respondent's tugs came to her assistance and attempted to tow her to a place of greater safety, but was unsuccessful, tide and wind carrying the vessel farther inshore, where she grounded on some rocks, and the tug left her. All persons were directed to go ashore, the master sending his instruments and belongings with them, but remained aboard with the mate and one of the ap-

pellants to assist him in leaving the vessel in case she broke up too fast, a contingency which he anticipated might occur at any time. The vessel was then one-half or three-quarters of a mile off shore, and the appellants made many trips from shore to vessel when the condition of the ice permitted, taking cargo to a place of safety. This work was attended with great danger and risk of injury, and continued for eight days, during which time the vessel was carried closer inshore, where she grounded with a considerable list, and the appellants cut holes in the lower side so that at low tide the water in the hold was able to escape. Before the tide turned these holes were covered by the appellants. In great danger to themselves, the appellants carried on this work. The vessel was finally saved and taken into port and repaired. The "Flint" completed her voyage and the appellants received the wages provided for in their contracts.

The appellants brought this action, claiming compensation under section 3 of the contract at the rate of one dollar per hour for the time they were engaged therein.

The appellants come within the designation of seamen and their rights are to be measured by those of seamen, and to them is applied the general rule that, under ordinary circumstances, they may not become general salvors of their own vessel, on the theory that by their contract they engaged for the stipulated wages to render such services as were necessary in the ship's behalf. There have been impressed upon this rule, however, certain exceptions which apply unless otherwise provided for in the contract and shipping articles. These exceptions are, some cases state, that seamen are entitled to salvage for extraordinary services beyond their duties under their contract. An examination of those cases, however, shows that these state-

ments are mere *obiter,* and, as stated by the author of the note in *Gilbraith v. Stewart Transp. Co.,* 121 Fed. 540, 64 L. R. A. 193:

"While the exception is thus admitted by *dicta* or *arguendo,* no decisions have been found in reliance upon it, although the probability that such decisions exist is intimated in one or two instances. It may be, however, that these cases refer to decisions allowing compensation in the nature of salvage for especially meritorious services."

The next exception is where the seamen have been discharged and have performed the work of saving the vessel or cargo after such discharge. This situation, of course, does not exist in this case. The third of these exceptions is where the vessel has been abandoned, and the cases hold that the crew of a vessel under articles for wages can become general salvors after the vessel has become wrecked without hope of recovery and the crew discharged from further services by the master of the vessel. The abandonment of the ship has the effect of dissolving the seamen's contract for wages so that for any services they thereafter render in saving the ship and cargo they may claim compensation as salvors, but they only become such salvors when there is such an abandonment of the vessel by order of the master. The difficulty arises in these cases of determining whether the facts constitute an abandonment.

The following cases are a few of the many which have dealt with the question of abandonment: *Hobart v. Drogan,* 10 Pet. (U. S.) 108; *The Dawn,* Fed. Cas. 3,666; *Hall v. Land,* Fed. Cas. 3,939; *Holder Borden,* Fed. Cas. 6,600; *John Perkins,* Fed. Cas. 7,360; *The Minch,* 61 Fed. 511; *The Minch,* 73 Fed. 859; *Torrey v. Kelly,* 121 Fed. 542; *The Comet,* 205 Fed. 991; *The Zapora,* 205 Fed. 1004.

The *Minch* case in 73 Fed. 859, reviews a great number of prior decisions of the Federal courts and the courts of England and after such review says:

"From this review of the authorities, it is apparent that, in every case where compensation in the nature of salvage has been awarded to seamen, the voyage has terminated by the shipwreck of the vessel, which has either gone to the bottom or left her bones on the shore, or she has been abandoned by all, or by all except the salvors, under circumstances which show conclusively that the abandonment was absolute, without hope or expectation of recovery, or the seaman has been by the master unmistakably discharged from the service of the shipowner."

The rule applicable to abandonment finds no better statement than that by Dr. Lushington, in *The Florence,* 16 Jur. 572, 20 Eng. Law & Eq. 607, where that distinguished authority on admiralty law lays down the rule that the elements indispensable to an abandonment in order to make the status of a seaman that of a salvor are that the abandonment must take place at sea and not upon a coast, for if the ship is wrecked upon a coast and the seamen escape to shore the contract continues to the extent, at least, that if they successfully act as salvors and save enough to pay their wages they are entitled to them but not to salvage, and if their exertions are not successful to that extent they then lose their wages; second, the abandonment must be *sine spe revertendi*; for a temporary abandonment does not dissolve the contract; third, the abandonment must be *bona fide* for the purpose of saving life; and, fourth, it must be by order of the master.

The Federal court, in the case of *Gilbraith v. Stewart Transp. Co., supra,* in a short opinion thoroughly discusses and elucidates this question:

"The crew of a vessel, under articles for wages, can become general salvors, only after the vessel has be-

come a shipwreck, without hope of recovery, and the crew discharged from further service. This general doctrine is not disputed. But it is insisted that, under certain circumstances, the crew though under articles for wages may become special salvors. Such relation arises, it is said, when the service rendered is arduous, perilous and meritorious, and under circumstances extraordinary in character. The argument is based for authority chiefly upon a *dictum* of Justice Story, in *Hobart v. Drogan,* 10 Pet. 122, 9 L. Ed. 363.

"None of the cases actually decided exemplify the application of any such rule. It is needless to restate their facts in detail. In none of them was there given to the claimants more than their transportation from the place of accident to their homes, and their sustenance, or such sums as would equal their sustenance, during that interval.

"But even this, meagre as it appears, is said by counsel to be a species of special salvage, and to illustrate the principle, if not the measure, of compensation that ought to be applied to the case under consideration. The argument has not won our concurrence. We do not doubt, that under the law, preexisting the recent legislation of Congress, freight was regarded as the mother of wages, and upon the loss of freight, wages ceased. But though in that state of maritime law, transportation home, and sustenance during that interval, were not, in strict logic, the payment of wages, they need not, by that fact alone, be attributed to the enforcement of any doctrine recognizing special salvage. The feeling underlying these early decrees was the dictate of humanity that shrinks from leaving a shipwrecked sailor on a distant shore, and, in cases of such catastrophe, added to the obligation of the master to pay wages, the further obligation to bring his crew home. To reach such a result there existed no need to build up a doctrine of special salvage, or in other ways than the one object to be attained, break into the settled law of ship and crew.

"But though the argument be accepted, the element upon which it is based is wanting in the case under consideration. There was no abandonment of the steamer

'Bielman.' The seamen lost nothing by the loss of freight; for, under existing law, the running of their contract for wages continued. The service rendered, in lightering the vessel, was different, in degree only, from the usual service in boisterous weather. What appellants did, plainly was within their duty as seamen, and was therefore paid for by the wages stipulated in the articles of employment."

The fourth exception is in case of recapture; which is not applicable here.

There has, however, grown up in admiralty a doctrine of compensation in the nature of salvage, which doctrine has been applied in some cases where the courts have been reluctant to close their eyes to acts of exceptional heroism and faithfulness in connection with extreme peril on the sea, but this recognition of merit serves as no exception to the general rule that seamen cannot become salvors of their own vessel, since salvage and compensation in the nature of salvage are dissimilar, not only in amounts, but in relation to the persons claiming them, salvage being awarded to one entitled to it as a matter of right, while the granting of the latter seeming to be a matter of discretion.

Counsel for appellants has cited in behalf of his argument that the appellants in this case are entitled to recovery in the nature of salvage some ten cases. Four of them will be found to be discussed in the *Minch* case, *supra,* and will be found to be cases of actual shipwreck and abandonment, and in cases where an abandonment was not found by the court, the libel was dismissed. Four of the remaining cases were cases of wreck and abandonment; one case seems to have no application here for the reason that salvage was allowed to sailors from a United States warship, who were not seamen on the wrecked ship and were, there-

fore, volunteers; and the last case seems to sustain the doctrine contended for by the appellants. An examination of these cases, which are: *The Dawn, supra; The Bowditch,* Fed. Cas. 1,717; *The Harvest,* Fed. Cas. 6,176; *Geiger v. The Mary Hale,* Fed. Cas. 9,213; *The Massasoit,* Fed. Cas. 9,260; *Mesner v. Bank,* Fed. Cas. 9,493; *The Niphon's Crew,* Fed. Cas. 10,277; *Reed v. Hussey,* Fed. Cas. 11,646; *Two Catherines,* Fed. Cas. 14,288; *O'Brien v. Umatilla,* 29 Fed. 252, shows that in nearly all of them the *Hobart* case, 10 Pet. 108, is referred to, where the United States supreme court, quoting Lord Stowell's definition of a salvor as "a person, who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer adventurer without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship," then says:

" . . . however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations, which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship, which they are bound to navigate."

These cases all involve services which were extraordinary and were rendered outside the scope of the seamen's contract, and cases where the ship was in fact wrecked and claims asserted against property actually salved from the wreck. But even though it might be admitted that, under certain circumstances, the work performed by the appellants would entitle them to compensation in the nature of salvage, the contract under which they were employed forecloses any such right. This necessitates an examination of those portions of the contract we have hereinbefore set forth.

These provisions of the contract are not, as claimed by the appellants, in any way conflicting or ambiguous.

They clearly cover the exact situation which the facts in this case disclose. By the contract, services such as were rendered by the appellants were not to be compensated for, and the appellants' only claim for compensation would be for salvage such as they would be entitled to in the absence of any contract. They have agreed that, when the vessel upon which they are seamen, or the property of respondent, might be endangered, they would do such work as would be necessary to protect it without extra compensation, and, further in section three that, in case of shipwreck or necessitated abandonment or lawful discharge, their wages should continue until such casualty or discharge, except for such men as are paid for the run, but that, if such disaster occur before the vessel has arrived at its destination, they should receive full run money, and in addition thereto salvage work should be paid for at the rate of one dollar per hour. This provision clearly indicates that the salvage work referred to was salvage as it is technically known in admiralty, that is, work done after shipwreck or abandonment or discharge, and § 25 clearly provides that no salvage should be paid or claimed except that provided for in § 3, to wit, salvage earned after shipwreck or abandonment or discharge. The facts in the case show no discharge, neither do they constitute a shipwreck or abandonment. The ship was in peril and the seamen performed strenuous and meritorious services, but when they undertook to go down to the sea in ships they accepted a hazardous occupation and assumed among their duties that of using their best endeavors to save their vessel and its cargo. They have lost nothing by reason of their arduous labors; their vessel proceeded upon its journey, and at its completion the full wages they had earned were paid them. Their ship never became a wreck without hope of recovery, nor was it abandoned

by all. The master authorized the crew to go ashore, but he did not thereby relinquish the hope of their ever returning to the vessel, and his whole object and intent was to secure her safety and their duty was to remain and assist in that endeavor. To hold otherwise would result, as indicated by the court in *Hall v. Land, supra*:

"It is not the mere leaving the ship by authority of the master that vacates the seamen's contract. In the case of shipwreck when the crew have reached shore, the seamen are not at liberty to refuse further exertion, and disperse themselves over the country; they are bound to remain by the wreck and assist in preserving the fragments. . . . If the rule of law which does not allow seamen to become salvors in the ordinary course of things, and while in the performance of their duties, whatever may have been the peril or hardships, or gallantry of their service in saving the ship and cargo, has any solid foundation in true policy, the same principle demands that they should not be permitted to assume that character on the ground that their contract has been vacated, except in extraordinary cases, where their relation to the vessel has been finally and unequivocally dissolved, and where the master has permanently renounced all hope of recovering or returning to her. Such is not the present case, and I am persuaded that I would violate the spirit which pervades the maritime law on the subject of the duties of seamen, if I should, under circumstances like the present, admit them as salvors. . . ."

The facts as they are alleged in the complaint do not entitle the appellants to salvage as such, nor to compensation in the nature of salvage, and the trial court was therefore correct in sustaining the demurrer to the complaint and dismissing the action, the appellants having elected to stand upon the complaint. Judgment affirmed.

PARKER, C. J., BRIDGES, FULLERTON, and HOLCOMB, JJ., concur.

[No. 15925. *En Banc.* January 25, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. MIKE HENNESSY, *Appellant*.[1]

INDICTMENT AND INFORMATION (77)—DUPLICITY—CRIMINAL SYNDICALISM—OFFENSES. Laws of 1919, p. 518, § 1, defines criminal syndicalism as a single offense of effecting or resisting any industrial, economic, social or political change in any of the different ways or means specified, which are not repugnant to one another, and does not define separate and distinct offenses arising out of disconnected transactions; hence an information substantially in the language of two subdivisions of the act charges but one offense and is not duplicitous.

INDICTMENT AND INFORMATION (34, 60)—INSURRECTION—CERTAINTY. An information charging criminal syndicalism substantially in the language of the statute, is not indefinite and uncertain, where it alleges the time and place, the connection of the accused with the Industrial Workers of the World and the purpose of that organization.

CONSTITUTIONAL LAW (59)—CIVIL RIGHTS—FREEDOM OF SPEECH. The criminal syndicalism statute, Laws 1919, p. 518, § 1, intended to prevent the teaching of crime, sedition, violence or intimidation as a means of overcoming the present social order is not unconstitutional as abridging the freedom of speech.

TREASON—OFFENSES—POWERS OF STATE. The syndicalism statute, Laws 1919, p. 518, § 1, against effecting or resisting any industrial, economic, social or political change in any of the ways specified, is not an attempt to punish constructive treason beyond the power of the state, or in violation of the Federal constitution, art. 3, § 3, providing that treason against the United States shall only consist of levying war against them, etc.; since the state may pass laws to aid or assist the national government and is one of its component parts.

CONSTITUTIONAL LAW (102)—PRIVILEGES AND IMMUNITIES—CLASS LEGISLATION. There is nothing on the face of the criminal syndicalism statute, Laws 1919, p. 518, § 1, showing an intention to restrict the discussion of economic and industrial questions among labor organizations; but the regulations bear with equal weight upon all in a like situation, and the act is not objectionable as class legislation.

[1]Reported in 195 Pac. 211.

CRIMINAL LAW (461)—PUNISHMENT—CRUEL AND UNUSUAL. The criminal syndicalism act, Laws 1919, p. 518, § 1, making certain acts a felony without prescribing the penalty and leaving the same subject to the general law in such case, Rem. Code, § 2265, which prescribes a penalty of not to exceed ten years in the penitentiary, or a fine not exceeding $5,000, or both, is not unconstitutional as providing cruel or unusual punishment.

SAME (3-1)—STATUTORY PROVISIONS—CREATION AND DEFINITION OF OFFENSES. The criminal syndicalism act, Laws 1919, p. 518, § 1, is not void for indefiniteness in that the phrase "or which will tend to encourage disrespect for the law" is uncertain.

STATUTES (22)—TITLES AND SUBJECTS—SUFFICIENCY. The title to the criminal syndicalism act, Laws 1919, p. 518, § 1, sufficiently indicates the particular subject and is "not too general for any purpose," as the title need not be an index to the act.

CONSTITUTIONAL LAW (53)—PERSONAL RIGHTS—LIBERTY AND SECURITY. The criminal syndicalism act, Laws 1919, p. 518, § 1, subd. 3, making it unlawful for any person to become a member of any group of persons formed to advocate the prohibited acts, is not unconstitutional as unduly infringing the personal liberties of the citizen.

INSURRECTION—ELEMENTS OF OFFENSE—INTENT. Knowledge or intent is not an element of the offense of criminal syndicalism, Laws 1919, p. 518, § 1, and one voluntarily becoming a member of a group of persons prohibited by statute and doing this act is guilty whether he intended to violate the law or not.

CRIMINAL LAW (27)—JURISDICTION—LOCALITY OF OFFENSE. The criminal syndicalism act, Laws 1919, p. 518, § 1, makes it an offense to "be a member" of a group of persons formed to advocate certain prohibited things, regardless of the county in which accused "joined" the organization; hence, although one joined in Y. county, he may be informed and proceeded against in the county in which he was found and committed the prohibited acts.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered January 23, 1920, upon a trial and conviction of criminal syndicalism. Affirmed.

George F. Vanderveer and *Ralph S. Pierce*, for appellant.

W. E. Yates, for respondent.

The Attorney General, amicus curiae.

MAIN, J.—The defendant was charged by an amended information with what is generally called criminal syndicalism, though it is not so named in the statute defining the crime. A demurrer to the information was overruled, the trial resulted in a verdict of guilty, and the defendant appeals.

The charging part of the information is as follows:

"That he, the said Mike Hennessy, 'on or about the 15th day of November, 1919, in the county of Clarke and state of Washington, then and there being, did then and there wilfully, unlawfully and feloniously organize, help to organize, give aid to, and voluntarily assemble with or be a member of 'The Industrial Workers of the World,' 'in a voluntary assembly and group of persons formed to unlawfully, feloniously, and anarchistically advocate, advise, and teach crime, sedition, violence, intimidation and injury as a means of effecting industrial, economic, social and political change,' and the said defendant, Mike Hennessy, did then and there print, publish, circulate, distribute, and display books, pamphlets, handbills, documents and other written and printed matter, advising, advocating, teaching and justifying crime, sedition, violence, intimidation and injury as a means and way of effecting industrial, economic, social and political change, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Washington."

The statute (Laws of 1919, p. 518, ch. 174), upon which the information is based is as follows:

"§ 1. Whoever shall

"(1) Advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(2) Print, publish, edit, issue or knowingly sell, circulate, distribute or display any book, pamphlet, paper, handbill, document, or written or printed matter of any form, advocating, advising, teaching or jus-

tifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(3) Organize or help to organize, give aid to, be a member of or voluntarily assemble with any group of persons formed to advocate, advise or teach crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change,

"Shall be guilty of a felony."

Comparing the information with the statute, it will be seen that the charge is substantially in the language of subdivisions two and three of the statute. The statute makes it a felony for a person to do any of the things specified therein "as a means or way of effecting or resisting any industrial, economic, social or political change." The crime defined in the act, speaking generally, is one against the present social order and may be committed in any of the ways therein set out.

It is first contended that the information was duplicitous in that it charged more than one crime and that for this reason the demurrer thereto should have been sustained. The information does charge the appellant with helping to organize, voluntarily assembling with, giving aid to and being a member of the Industrial Workers of the World and that he did print, publish, circulate and distribute certain books, pamphlets and so forth. It is the general rule that where a single offense may be committed in different ways or by different means, it may be charged in the information to have been committed by more than one of the ways or means. *State v. Pettit,* 74 Wash. 510, 133 Pac. 1014; *State v. Gaul,* 88 Wash. 295, 152 Pac. 1029; *State v. Wingard,* 92 Wash. 219, 158 Pac. 725; *State v. Klein,* 94 Wash. 212, 162 Pac. 52; *State v. Brummett,* 98 Wash. 182, 167 Pac. 120.

On the other hand, if the statute defining the crime charges separate and distinct offenses arising out of disconnected transactions, an information which charges more than one of the offenses would be duplicitous. *State v. Dodd,* 84 Wash. 436, 147 Pac. 9; *Seattle v. Molin,* 99 Wash. 210, 169 Pac. 318.

While the general rule is plain enough, it is not always easy to determine whether the information, based upon a particular statute and in substantially the language thereof, charges separate and distinct offenses or whether it charges one offense and sets out the various ways or means by which that offense may be committed. The appellant in this case contends that the information charges separate and distinct offenses. If this be true, then the statute upon which it is based defines not one offense and specifies the ways in which it may be committed, but defines a number of separate and distinct offenses.

The chief reliance of the appellant is upon the *Dodd* and *Molin* cases just cited. In the *Dodd* case, the defendant was charged under a statute which made it an offense to place a female in charge of another person for an immoral purpose or, being the husband of a woman, conniving and consenting to her leading a life of prostitution, or soliciting persons to go to a house of prostitution for an immoral purpose. It was there held that the information was duplicitous because the act of the husband in placing his wife in custody of another person for an immoral purpose and with intent that she shall lead a life of prostitution had no readily perceived connection with the act of soliciting persons to go to a house of prostitution for an immoral purpose. In the *Molin* case, the defendant was charged with violating the general liquor ordinance of the city of Seattle, and it was claimed that the complaint was bad for duplicity. The defendant there was charged

with manufacturing liquor, selling, bartering and disposing of liquor, buying, receiving and giving liquor for an unlawful purpose, buying liquor contrary to law and having a prohibited amount of liquor in his possession. It was there held that the complaint charged at least five separate and distinct offenses arising out of disconnected transactions based upon wholly different provisions of the ordinance. It is easy to see that the ordinance which defines manufacturing liquor, buying liquor contrary to the law, and so forth, charges separate and distinct offenses. There was no major crime which could be committed in each of the specified ways as defined in the ordinance under consideration in that case.

The test, applied by these two cases, to determine whether the act charges and the statute defines more than one crime or whether it defines a single crime which may be committed in a number of different ways is whether there is a readily perceived connection between the things charged. If there is no reasonable connection, one with the other, and they are disconnected transactions, the information is duplicitous.

Applying this test to the present case, it appears as already indicated, that the crime defined by the statute and of which the appellant is charged was that of "effecting or resisting any industrial, economic, social or political change" in any of the ways specified in the act. It was not made criminal to do the things there mentioned for any other purpose. It would seem that there is a direct and immediate connection between organizing, helping to organize, giving aid to and so forth, and voluntarily assembling which has a definite object to accomplish and the printing, publishing, circulating, and so forth, of books, pamphlets and other printed matter having for its object the same purpose. One is the organizing, the other the propaganda put

forth and the result to be accomplished is the same, each having the common object as defined by the statute of effecting or resisting any industrial, economic, social or political change. The information upon which the appellant was tried in this case does not fall within the rule of the *Dodd* and *Molin* cases, but comes within the general rule above stated, where a single offense may be committed in different ways it may be charged in the information to be committed in more than one of the ways.

There is another reason why the trial court was correct in overruling the demurrer, and that is that the ways and means specified in the statute by which the crime may be committed are not repugnant to each other. *State v. Pettit,* and *State v. Wingard, supra.* In the *Wingard* case it was said:

"But this court has held, and the general rule is, that 'where a single offense may be committed in different ways or by different means, it may be charged in the information to have been committed by more than one of the ways or means, provided the ways or means charged be not repugnant to each other.'" Citing the *Pettit* and the *Gaul* cases.

In the *Klein* case it was said:

"In other words, the defining statute enumerates disjunctively a series of acts, either of which separately, or all together, so far as they are not in their nature inconsistent, may constitute the single offense of larceny. In such a case it is thoroughly settled that the information may charge in a single count the commission of the offense in any, or, by conjunctive allegation, in all of the enumerated and not inconsistent ways."

Other cases from this court might be cited and reviewed but a detailed consideration, of how the court has held in each specific case, would greatly extend this opinion and would add nothing to the general rule. Each case must depend to a considerable extent upon

the statute presented for construction and whether the information drawn thereon is duplicitous may be determined by the tests above indicated.

The information was not duplicitous and the demurrer thereto was properly overruled.

The second point is that the information is indefinite and uncertain and therefore did not sufficiently advise the appellant as to the charge which he was required to meet. The statute (Rem. Code, § 2065) provides that an information to be sufficient must distinctly set forth in ordinary and concise language, without repetition and in such a manner as will enable a person of common understanding to know what is intended to be charged. The holding in *State v. Lowery,* 104 Wash. 520, 177 Pac. 355, is controlling on this point. There the defendant was charged in the substantial language of the statute with the crime of criminal anarchy. The statute in some respects is similar to the statute here under consideration. There the information alleged the time and place of the alleged crime, the connection of the defendant with the Industrial Workers of the World, and the purpose of that organization. It was there said:

"The information, surely, is sufficient to notify the defendant of the charge which he is called upon to defend against; it specifies the time, the place, and the means by which the crime is alleged to have been committed, and it so charges it that a person of common understanding cannot mistake its meaning. Had the defendant not been satisfied that the facts had been plead with sufficient elaboration to fully apprise him of the charge, he could have demanded that this enlightenment be furnished him by means of a bill of particulars, but he did not seek that source of information, being content to demur to the information, which charges the crime substantially in the language of the statute, and states the acts which constitute the offense in ordinary and concise language."

The information in question alleges the time and place, the connection of the defendant with the Industrial Workers of the World, and the purpose of that organization. As pointed out in the *Lowery* case, no bill of particulars was demanded there and none was demanded in this case. The information was not bad for indefiniteness and uncertainty.

The third point is that the syndicalism statute amounts to an attempt to punish constructive treason and is unconstitutional. The argument in the appellant's brief on this question takes a wide range, during the course of which the provision of the Federal constitution which provides that no law shall be made abridging the freedom of speech is quoted. Also the provision of the same constitution which provides that no law shall be passed which abridges the privileges and immunities of the citizens of the United States, and § 3, art. 3, which is: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Section 5, art 1, of the constitution of this state provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." In *State v. Fox,* 71 Wash. 185, 127 Pac. 1111, the defendant was convicted under the statute which provided that every person who prints, publishes or circulates any written or printed matter advocating or encouraging a breach of the peace or violence which would tend to encourage less respect for law, should be guilty of misdemeanor. The law was sustained and in the course of the opinion it was said:

"While the constitutions of the United States and of this state guarantee the right to freely speak, write and publish upon all subjects, it is not meant thereby that persons may with impunity advocate disregard of

law; or, as said in *People v. Most,* 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509: 'While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state.' "

That case was taken to the United States supreme court and the holding of this court was affirmed. *Fox v. Washington,* 236 U. S. 273. In *State v. Moilen,* 140 Minn. 112, 167 N. W. 345, the court sustained an act similar to the one here in question. The fact that treason is defined in the Federal constitution does not deprive the state legislature of the power to enact the statute which is intended to prevent the teaching of crime, sedition, violence or intimidation as a means of overcoming or destroying the present social order. In *Ex parte Bollman,* 8 U. S. 74, during the course of the opinion it was said:

"Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation, by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court, must have conceived it more safe, that punishment in such cases, should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occa-

sion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

While the Federal government undoubtedly has ample power to protect its sovereignty, it does not necessarily follow from this that the legislature of a state may not pass laws for the purpose of aiding or assisting the national government. The state is one of the component parts of the Federal government and what affects the latter affects the former. *State ex rel. Hart v. Clausen,* 113 Wash. 570, 194 Pac. 793.

The fourth point is that the statute is class legislation. The argument here seems to be based on the assumption that it was "intended to restrict the discussion of economic and industrial questions among labor organizations." There is nothing, however, on the face of the act to justify this assumption and the court in considering the question is governed by its terms. The legislature has power to pass all needful police regulations and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. *State v. Fraternal Knights & Ladies,* 35 Wash. 338, 77 Pac. 500; *State v. Nichols,* 28 Wash. 628, 69 Pac. 372; *State v. Nichols,* 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B 1088. The act is general in its terms and provides that "whoever" shall do the things there prohibited, shall be guilty of a felony. Under this language anyone, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions.

The fifth point is that the statute violates the constitutional prohibition against cruel and unusual punishments. It will be observed that the act makes the doing of the prohibited things a felony but does not fix a penalty. No penalty being fixed in the act the punishment would be that prescribed for a felony but not fixed by the statute defining the crime. Remington's Code, § 2265, provides that every person convicted of a felony for which no punishment is specifically prescribed by any statutory provision in force at the time of the conviction "shall be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than five thousand dollars, or both." Under this statute the trial court had the power to fix the term of imprisonment for any period not exceeding ten years or for any sum as a fine not exceeding five thousand dollars, or by both such imprisonment and fine. There is no merit in the contention that the statute violates the constitutional provision against cruel and unusual punishments. *State v. Feilen,* 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914 B 512, 41 L. R. A. (N. S.) 418.

The sixth point is that the statute is void for indefiniteness. In *State v. Fox, supra,* the same objection was made to the statute there being construed. In answering the objection it was said:

"The appellant also argues, and cites numerous cases to the effect, that a statute creating an offense must be certain, and that, where the law is uncertain, there is no law. This is no doubt the rule. We are satisfied it has no application to the statute under consideration. The statute provides: 'Every person who shall willfully . . . edit . . . any . . . paper . . . or printed matter . . . advocating . . . the commission of any crime . . . or which shall tend to encourage disrespect for law . . . shall be guilty of a gross misdemeanor.' It is argued that

the phrase 'or which shall tend to encourage disrespect for law' is entirely uncertain. But it has been held that a criminal statute is not void for uncertainty because it denounces acts which 'tend,' or are 'reasonably calculated,' to bring about prohibited results. *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86."

In *State v. Brown,* 108 Wash. 205, 182 Pac. 944, one of the questions was whether the statute which made it a misdemeanor for any person to drive or propel a vehicle upon any public street or highway which with or without its load should be of such weight as to destroy or permanently injure such street or highway was void for indefiniteness. It was there said:

"The objection to the statute is that it does not definitely and clearly define the offense intended to be denounced by it. It is argued that a statute to be free from the objection of indefiniteness and uncertainty must be so far specific that a person may know in advance whether his act will or will not be a violation of the statute, and that this statute is not thus specific, since the operator of the vehicle cannot know until he actually makes the trial whether the load will or will not permanently injure the highway. In other words, the contention is that a statute, to be free from the objection that it is indefinite and uncertain, must specifically point out the acts which constitute the crime, not merely prohibit results produced by acts. But such is not the rule. The legislation in creating an offense may define it by a particular description of the acts constituting it, or it may define it as an act which produces, or is reasonably calculated to produce, a certain defined or described result. 16 C. J. 67. If this were not so, it would be easy to find many statutes now upon the books which are open to the objection of uncertainty, but which have heretofore never been suspected of that fault. As illustrations; the statutes making it an offense to willfully disturb any religious meeting (Rem. Code, § 2499), any assembly or meeting not unlawful in its character (Id., § 2547), or any school meeting (Id., § 4697), or the legislature, or either house

thereof (Id., § 2337), are all statutes which do not specify the particular acts which will constitute the disturbance; yet no case can be found where they have been held invalid for that reason, while there are many which have allowed convictions thereunder to stand. Other illustrations, without specifically enumerating them, can be found in the statutes against malicious mischief, injury to public utilities, injuries to property, the statutes defining and punishing vagrancy, obstructing an officer in the discharge of his duty, publishing articles tending to excite crime or a breach of the peace, and the like, all of which define the crime by the result it produces rather than by the specific acts constituting the offense."

The act now before us is no more indefinite than were the statutes which were before the court in those cases; to hold that the syndicalism act is void for indefiniteness would require a modification of the holding in the cases just cited and especially in the *Brown* case. The act is not void for indefiniteness.

The seventh point is that the title of the statute is insufficient because it does not specifically refer to doing the prohibited things for the purpose of effecting any industrial or economic change, and for the further reason that the language used "is too general for any purpose." It has frequently been held by this court that it is enough if the title of an act is sufficient to indicate to a person making inquiry that the act may cover a particular subject. It is not necessary that the title be an index to the body of the act. In *State v. George,* 84 Wash. 113, 146 Pac. 378, it was claimed that the title of the act which was "An act relating to crimes and punishment and the rights and custody of persons accused or convicted of crime and repealing certain acts" (Laws of 1909, p. 890, ch. 249), was not sufficient. It was held, however, that the language used was broad enough to cover the subject-matter of the act. Upon the authority of that case and

others that might be assembled the title of the act was sufficient. It has become the settled doctrine of this court that no act will be held unconstitutional on the ground that the title is not sufficient unless it clearly appears that such title does not meet the constitutional requirement.

The eighth point is that subdivision 3 of the act infringes upon the personal liberties of the citizen and is therefore unconstitutional. This point is more particularly directed to that portion of subdivision 3 which makes it unlawful for anyone to become a member of any group of persons formed to advocate, and so forth, the things prohibited by the act. In support of his contention on this point the appellant cites a line of cases like *Ex parte Smith*, 135 Mo. 223, 36 S. W. 629, 58 Am. St. 576, 33 L. R. A. 606, which holds that an ordinance forbidding anyone to associate with persons having the reputation of being thieves, burglars and so forth with intent to commit an offense is unconstitutional and that it invades the rights of personal liberty. Without either approving or disapproving the rule of the cases cited, it seems to us that there is a distinction between them and the present case. An ordinance or act which makes it unlawful to associate with persons having the reputation of being thieves, and so forth, is different from an act which makes it unlawful for anyone to organize or help to organize a group of persons to advocate and teach crime, and so forth, for the purpose which is specified in the syndicalism act. If it were in the legislative province, as we have found, to make it a penal offense to do the prohibited things in the act, including the organization of a group of persons, it would seem to follow that it were likewise within the power of the legislature to make it a penal offense for anyone to become a member of such group of persons or organization. The legis-

lature, in defining and providing for the punishment of crime, is exercising only one phase of the broad police power of the state. It did not exceed its power when it made it a penal offense for anyone to become a member of a group of persons organized for the purposes prohibited by the statute.

The ninth point is that the court erred in not submitting to the jury the question of the defendant's knowledge or intent to commit the crime with which he was charged. The court was requested to instruct the jury that, before they could find the appellant guilty, it was necessary for them to find that he had knowledge of the unlawful purposes and objects of the organization. This request was refused. The question, therefore, is presented as to whether, under the statute, criminal intent is a necessary element of the crime. The general rule upon this subject as stated in 8 R. C. L. 62, is as follows:

"The maxim *actus non facit reum, nisi mens sit rea,* does not always apply to crimes created by statute, and therefore if a criminal intent is not an essential element of a statutory crime, it is not necessary to prove any intent in order to justify a conviction. Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

In *Ellis v. United States,* 206 U. S. 246, the accused had been convicted, while a contractor on certain public work, of requiring or permitting certain laborers "to work more than eight hours in any calendar day except in case of extraordinary emergency." This was an act of Congress and one violating it was made guilty of a misdemeanor. Upon the trial, the jury were instructed that if the accused intended to permit the man to work more than eight hours on a calendar day named, he intended to violate the statute. The effect of this instruction was to make the defendant guilty if he intended to do the thing complained of regardless of whether he intended to violate the law. It was there said:

"It is admitted that he was a contractor within the meaning of the act and that the workmen permitted to work more than eight hours a day were employed upon 'public work', and it is not denied that these workmen were 'mechanics'. The jury were instructed, subject to exception, that if the defendant intended to permit the men to work over eight hours on the calendar day named he intended to violate the statute. The argument against the instruction is that the word 'intentionally' in the statute requires knowledge of the law, or at least that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

In the present case the defendant voluntarily became a member of a group of persons prohibited by statute, and in doing this act, he became guilty of the offense whether he intended to violate the law or not. As was stated in the *Ellis* case,

"If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

Whether intent or guilty knowledge is an essential element of a statutory crime depends upon the intent of the legislature. There are statutes which, in defining a crime, expressly provide that guilty knowledge shall be an element thereof. There are other statutes, which the courts have construed to the effect that the legislature intended by the language used to make guilty knowledge or intent an element of the crime. In the syndicalism act, there is no provision making guilty knowledge or intent an element of crime, neither can it be said from the language used that the legislature had such intent. To sustain the appellant's contention upon this question, it would be necessary to write into the statute a proviso which the legislature did not place there. The case of the *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B 917, 32 L. R A. (N. S.) 1216, is not controlling. There the act which took away from a man, charged with certain crimes, the right to plead insanity in defense was held unconstitutional. That case differs from the present in this, that if the accused were insane he could not have formed the intent to do the particular act.

The tenth point is that the superior court of Clarke county had no jurisdiction because the appellant became a member of the Industrial Workers of the World in Yakima county and the evidence failed to show that there was any group of persons organized in Clarke county which was prohibited by the act of which the appellant was a member. In support of this contention, reliance is placed upon § 22, art. 1, of the constitution of this state which provides that, in criminal

prosecutions, the accused shall have the right to be tried in the county in which "the offense is alleged to have been committed." The argument is that, since the appellant became a member in Yakima county, under the statute he was not subject to be charged with being a member in Clarke county. The act reads upon this question in effect that, whoever shall "be a member of" any group of persons formed to advocate, advise and so forth, shall be guilty of a felony. Under the terms of the act, the appellant was a member whether he be in Yakima county or Clarke county, and it is the being a member which the statutes make penal. The superior court of Clarke county had jurisdiction.

The eleventh point is that the introduction in evidence of state's exhibit No. 1 was error because it is claimed that the appellant's rights under, §§ 7 and 9, art. 1, of the constitution of this state, and of articles 4 and 5 of the amendments to the constitution of the United States, had been invaded when it was obtained from him. The state's exhibit No. 1 was of appellant's membership card in the Industrial Workers of the World. To the contention on this point, there are two answers: First, the exhibit was not wrongfully or unlawfully obtained from the accused; and second, if it had been so obtained, the question was not raised until after the trial of the action had begun, and consequently came too late. *Adams v. New York,* 192 U. S. 585; *Weeks v. United States,* 232 U. S. 383. The amendments to the constitution of the United States relied upon contain no restrictions on the power of the state and are not applicable in the present case. *Brown v. New Jersey,* 175 U. S. 172. The manner in which the card was obtained in no way violated the rights of the accused under the state constitution.

The twelfth point is that the court erred in its rulings upon the receipt and the rejection of evidence. As to the evidence received, of which complaint is made, it was admissible under the holding in *State v. Lowery, supra.* As to the evidence offered and rejected, it was either incompetent, or not relevant to any issue to be determined by the jury. To discuss this evidence in detail, would greatly prolong this opinion.

The final point is that there was no evidence to sustain the information. This point has been covered by what has been previously said and requires no further discussion. There was sufficient evidence to carry the question of the appellant's innocence or guilt to the jury.

The judgment will be affirmed.

All concur.

[No. 15938. Department One. January 26, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. J. S. BURK, *Appellant*.[1]

GAME—CRIMINAL PROSECUTION—VIOLATION OF GAME LAWS—JUSTIFICATION—PROTECTION OF PROPERTY. In a prosecution for violation of the game law making it a criminal offense to kill elk, it is a complete defense to show that the killing was reasonably necessary to prevent the destruction of the accused's property.

SAME—EVIDENCE OF JUSTIFICATION—SUFFICIENCY. In a prosecution for unlawfully killing elk, in violation of the game law, a reasonable necessity for the killing is shown by evidence to the effect that a band of elk were in the habit of trespassing upon accused's property, destroying crops, doing material damage, and on one occasion had killed a valuable calf, that they had been repeatedly driven off but returned and were running through and trampling crops at the time two of them were shot by accused.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for killing elk in violation of the game laws, upon an issue as to the necessity

[1]Reported in 195 Pac. 16.

of the killing in defense of property, accused may show recent past injury by the elk in question, and the extent of the damage done or threatened.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered February 24, 1920, upon a trial and conviction of violation of the game laws. Reversed.

William B. Clark, for appellant.

O. R. Schumann and *J. Lenox Ward,* for respondent.

BRIDGES, J.—The defendant was charged, by a criminal complaint lodged in the justice of the peace court of Yakima county, with unlawfully killing and having in his possession and under his control an elk, including the hide, horns and hoofs. At the same time, another criminal complaint was filed against the defendant in the same court wherein an identical charge was made concerning another elk. The two cases have been consolidated for the purposes of trial and appeal. It was claimed by the state that the defendant had violated Rem. Code, § 5395-33, which, in substance, provides that no person shall hunt, catch, take, kill or have in his possession any elk or part thereof. The defendant was convicted. He appealed to the superior court, where he was again convicted. A new trial was granted him, however, in that court, and in another trial he was again convicted, and has now appealed to this court. He has at all times admitted that he killed the two elk and had their dead bodies in his possession, until the same were surrendered by him to the county game officer. As a defense to such killing, he sought to justify himself on the ground that the elk were, at the time of the killing, in the act of damaging and destroying his crops.

As we understand it from the argument, the state has raised two chief questions in support of the judg-

ment of conviction. They are, first, that the appellant will not be heard, under any circumstances, to justify his violation of the statute on the ground that the elk were damaging his property; and second, that, if it be conceded that in a case of this character the defendant may so justify his act, then his testimony in this case was insufficient to show any justification, and was properly taken by the court from the jury. The court heard appellant's justification testimony, but held that it was wholly insufficient and did not tend to justify his act, and it refused to submit it to the jury. The result was that the only testimony before the jury was that the elk had been killed by the appellant, and, of course, the jury could do nothing but return a verdict against him. We shall discuss the respondent's two propositions in the order mentioned.

The argument of the state is to the effect that one may not justify himself in the killing of an elk, in violation of express provisions of the statute, simply because the elk, at the time of the killing, may be damaging or even threatening to destroy the property of the person charged with the killing. It is argued that, when the legislature enacted this statute for the protection of elk, it must have realized that they might trespass upon the lands of private individuals and do material damage to crops or domestic animals, but determined that the preservation of the elk was of such importance to the people of the state as that the private individual should bear his loss for the good of the public. This argument is more plausible than sound. The state places its reliance largely upon the case of *Barrett v. State,* 220 N. Y. 423, 116 N. E. 99, Ann. Cas. 1917D 807, decided in 1917. The legislature of the state of New York had passed and put into force a comprehensive law with reference to the protection and increase of the beaver. It was made a criminal

offense to kill, destroy, or in any manner interfere with this animal. The statute authorized the state officers to obtain, by purchase or otherwise, beaver, and to place them in favorable locations within the state. Acting by virtue of this law, the state authorities turned loose four beaver upon Eagle creek, in the state of New York. These four beaver and their increase remained in this locality. Close by, Mr. Barrett owned a small tract of land, chiefly valuable for building sites, and it was so made valuable because of the great number and character of the trees growing thereon. From time to time, these beaver, following their instincts, had either cut down or girdled and killed a large number of these valuable trees, and threatened to destroy all the rest. Mr. Barrett began suit against the state to recover his damages. In the lower court he recovered. The appellate division of the court affirmed the award to him. The court of appeals, however, in the case cited, reversed the lower court and held that the plaintiff could not recover. The court held that the state had a constitutional right to pass laws for the protection and preservation of the beaver and other wild animals, and further said:

"Wherever protection is accorded harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result."

That, however, was a civil case and it was properly decided that, in no event, could the state be held liable to private individuals for damage done by animals protected by state law. While some things announced

in the opinion might, at first glance, appear to be applicable to this case, yet we must assume that the court used its language as applicable to a civil action and not to a criminal case such as this.

If, in this case, the appellant had undertaken to defend on the ground that he killed the elk for the protection of his life, or that of some member of his family, then, unquestionably, such defense would have been available. But the constitutional right is to defend not only one's life but one's property. The difference in the justification in killing a protected elk in defense of one's life and killing one in defense of one's property is only in degree. Undoubtedly, a stronger showing would have to be made by one undertaking to justify his violation of the law in defense of his property than he would be required to make in defense of his life.

The case of *State v. Ward*, 170 Iowa 185, 152 N. W. 501, Ann. Cas. 1917B 978, appears to be directly in point. In that state there was a statute that made it unlawful for any person to kill any deer, elk or goat. The defendant was a farmer, and in his neighborhood was a band of deer which, for a long time past, had been in the habit of appearing upon his premises and eating up and trampling down much of his grain. On many occasions he had driven them away, but after they had done much damage, on one occasion, he shot and killed one of them. He was arrested and charged with violating the statute and convicted in the lower court, but upon appeal to the supreme court of the state of Iowa the judgment was reversed. The court put the question before it as follows:

"The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it in another way: Is it open to the

defendant to justify an admitted killing by showing a reasonable necessity in defense of person or property?"

The court, among other things, then says:

"By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of person and property is a constitutional right . . . and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing."

This whole question is elaborately and learnedly discussed in the case of *Aldrich v. Wright,* 53 N. H. 398, 16 Am. Rep. 339. In that state there was a law for the protection of, and against the killing of, mink. Wright had some geese which these mink were in the habit of chasing and threatening to kill. On one occasion, when the mink were in the act of chasing the geese, Wright, for the purpose of protecting the latter, shot and killed the mink. He was criminally charged with violation of the statute. After an elaborate discussion of the principles involved, the court concludes that the defendant had a right to justify his act, and that his testimony showed he was justified in the killing.

The purpose of these laws is the protection of the game from destruction. The act must be reasonably construed to accomplish the purpose in view. It was not intended that one may not, in defense of his person, kill an elk or other protected animal, nor was it the intention to make it unlawful, under all circumstances, for one to protect his property against the acts of such animals by killing them. Viewing the statute in this

light, it may be justly said that one who kills an elk in defense of himself or his property, if such killing was reasonably necessary for such purpose, is not guilty of violating the law. If such statutes be given the construction contended for by the state, they would probably be unconstitutional, as violating statutory and constitutional provisions authorizing one to protect himself and his property.

We, therefore, hold that the appellant in this case had a constitutional right to show, if he could, that it was reasonably necessary for him to kill these elk for the protection of his property. The views of the trial court were unquestionably in accord with those expressed by us; but he held that the testimony by which the appellant sought to justify his act was insufficient as a matter of law for that purpose. In other words, he held that the testimony failed to show any justification.

It is, therefore, necessary for us to see what testimony the appellant offered tending to show his justification and which the court refused to submit to the jury. After the state had put in its testimony, and after the appellant had admitted the killing of the elk and was seeking to show justification, the trial court excused the jury and required him to proceed with his proposed testimony in order that the court might determine whether it was sufficient to submit to the jury. The testimony offered by him tended to show the following: that he owned a tract of land which was grown to corn, potatoes, meadow and other crops; that a band of eight elk had recently been in the habit of coming upon his premises and causing damage; that a short while before he shot any of the elk, he had on one night three times driven them from his premises; that on one occasion they had killed a valuable calf, and on another severely injured another calf; that the

elk were in the habit of running through his cornfield and knocking down the corn and greatly damaging it; that, about the time in question here—at seven o'clock in the morning—he discovered this band of elk running through his cornfield and potato patch, knocking down and trampling upon his crops, and that while they were so doing, he shot a male and female elk. He identified these two animals as being two of the herd of elk which had theretofore been on his place.

The court concluded that this testimony would not show justification for the killing of the elk. In our judgment, the decision of the court was wrong. It seemed also to have been of the opinion that no testimony could be introduced except that which tended to show the damage done or threatened to be immediately done by the particular elk which were killed, and that that testimony should be limited to the damage being done at the time of the killing. If the court intended to so rule, we think he was in error for the reasons we will later give.

It might, with some reason, be argued that, under no circumstances, is the question of the sufficiency of the testimony to show justification a matter of law for the court to decide. In any event, generally speaking, it is a question of fact for the jury. In this case, we have no doubt there was plenty of testimony on the question of justification to carry the case to the jury. The appellant should also be permitted to introduce testimony showing the recent past injury done by this band of elk, not for the purpose of justifying the appellant in killing them because of such past damage, but for the purpose of showing their destructive capability, and what the appellant might have expected the elk would do at the time he killed them, judging by past experience; that is to say, in determining whether or not it was reasonably necessary for him to kill the elk, the appellant

might take into consideration his knowledge of damage done to him by the elk on other recent occasions, as tending to indicate the damage they might do on this occasion, if not interfered with. The trial court was quite right in his ruling that one may not kill a protected animal which at the time is trespassing upon his land as a punishment for any past injury which that animal had done. But that principle of law would not make it proper to exclude all evidence of recent prior injury done by such elk on similar occasions.

So, also, appellant should be permitted to show the damage being done or threatened to be done, at the time of the killing, by the whole band of elk, provided he identified the two elk in question as being a part of that band; this, not for the purpose of justifying him in killing these two elk on account of any damage being done by the other members of the band, but because those killed, together with their mates, were doing or threatening to do the damage. The necessities of the situation require this, because it might, and probably would, be quite impossible for appellant to point out the particular damage being done by the two elk which were killed.

We revert to the sufficiency of the testimony to show justification. The reasonable necessity rule is the one which must control in a case of this character. Doubtless, circumstances might arise where the court might be justified in holding, as a matter of law, that the testimony failed to show such reasonable necessity, such as killing of elk solely because of past damage done by them; or because of a simple trespass without any material damage done or reasonably threatened. But here, according to the testimony offered, these same elk had recently several times been trespassing and had done actual and material damage; several times appellant had driven them from his premises;

at the time he shot, they were in his corn, eating it and knocking it down, and trampling on his other crops. It cannot be said that this testimony was, as a matter of law, insufficient. It was for the jury to determine its sufficiency. Generally, all questions of fact are for the jury. It is only in exceptional instances where they are for the court. While we have not seen many cases of the kind here involved, the following authorities will throw light on the subject: It is said in 2 Cyc. 415:

"One may kill a vicious animal in the necessary defense of himself or the members of his household, or under circumstances which indicate danger that property will be injured or destroyed unless the aggressor is killed, but it seems that such killing is justified only when the animal is actually doing injury. . . . Every person has a natural right to defend and protect his animate property—as cattle, stock, and fowls—from injury or destruction by dogs, and in pursuance of that object may kill dogs engaged in doing injury to such animals owned by him; but there must exist an apparent necessity for such a course, and the destruction of the dog must be reasonably necessary under the circumstances. . . . The right to kill dogs, in order to protect inanimate property, is based upon the same considerations."

It has also been held that reasonable grounds to fear injury to property is a good defense to a prosecution for cruelty to animals. *Hunt v. State,* 3 Ind. App. 383, 29 N. E. 933; 3 C. J. 70. In 3 C. J. 163, the following rule is laid down:

"Where facts amounting to a justification are shown it is error to take the consideration of such facts from the jury. As a general rule it is for the jury to determine, in an action for damages for killing a dog, whether the dog was of such vicious nature or evil habit as placed it within the right of any man to kill it; or whether under all the circumstances the danger to defendant's property was of such a char-

acter as to justify the killing of the dog to avoid it. Likewise it is generally within the province of the jury to determine the question of the reasonableness of defendant's apprehension of injury, and of the means of defense employed to prevent it, and whether or not the means employed were the proximate cause of the animal's death."

In the case of *State v. Barr,* 11 Wash. 481, 39 Pac. 1080, 48 Am. St. 890, 29 L. R. A. 154, this court said:

"It is a universal principle that neither in defense of person nor property can one go further than is reasonably necessary for that purpose, and this single principle followed to a logical conclusion will establish the proposition that whether or not that was done in a particular case was justified under the law must be a question of fact, or mixed law and fact, and not a pure question of law."

We cite the following cases as lending weight to these propositions: *Harrington v. Hall,* 6 Penne. (Del.) 72, 63 Atl. 875, where it was held that where defendant shot plaintiff's dog while the latter was on his premises, killing his turkeys, his act was justified; *Thompson v. State,* 67 Ala. 106, 42 Am. Rep. 101, where it was held that:

"The general principle is not denied that a person may lawfully kill an animal when necessary for the preservation of his property, as when one shoots a dog accustomed to injure sheep, and found at the time in the act of killing one."

Also, *Hubbard v. Preston,* 90 Mich. 221, 51 N. W. 209, 30 Am. St. 426, 15 L. R. A. 249, where it was held that shooting into some dogs, gathered on one's premises at night, barking, quarrelling and fighting, so as to keep the family awake, seriously annoying them until it has become an intolerable nuisance, is justified if it is a reasonable and necessary means to protect the family from such nuisance. See,

also, extensive note to that case, 15 L. R. A. 249. See, also, *Canefox v. Crenshaw*, 24 Mo. 199, 69 Am. Dec. 427; *State v. Ward, supra.*

We think the appellant was entitled to have the jury consider the sufficiency of his justification testimony. The judgment is reversed and the cause remanded for new trial.

PARKER, C. J., HOLCOMB, MACKINTOSH, and FULLERTON, JJ., concur.

[No. 16065. Department One. January 26, 1921.]

S. R. SHELLEY *et al., Respondents,* v. W. H. NORMAN *et al., Appellants.*[1]

EVIDENCE (184)—OPINION EVIDENCE—CONCLUSIONS. The testimony of a passenger in an automobile that there was not sufficient room to pass to the right of an approaching automobile, is not objectionable as calling for the conclusion of the witness.

HIGHWAYS (58)—NEGLIGENT USE—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE. Whether plaintiff was guilty of contributory negligence in turning to the left to avoid an automobile collision, is a question for the jury, where there was testimony to the effect that it was done in an emergency to avoid a head-on collision with a car driven on the wrong side of the road wrongfully attempting to pass another car when there was not sufficient room or time to do so.

SAME (59)—NEGLIGENT USE—ACTIONS — INSTRUCTIONS. Where a highway had two traveled tracks, it is proper to instruct to the effect that the right of the center of a highway to one using one of the traveled tracks would mean the right of the center of the track being used.

SAME (59). An instruction is proper where it is stated that one turning to the left in meeting another car is guilty of contributory negligence unless he had reasonable ground to believe that it was his duty to do so to avoid a collision and a reasonably prudent man would have honestly believed that the collision was imminent if he turned to the right.

[1]Reported in 195 Pac. 243.

DAMAGES (80)—EXCESSIVE DAMAGES—INJURY TO PERSON. A verdict for $2,000 damages sustained in an automobile collision is not excessive where the car was badly damaged, and both husband and wife were seriously injured, one sustaining a broken arm, bruises and other injuries, and the other two fractured ribs, and injury to chest, back and arm.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered December 4, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

Stephen E. Chaffee, for appellants.

Snively & Bounds, for respondents.

HOLCOMB, J.—This is an action and cross-action for damages for injuries resulting from a collision of automobiles belonging to the respective parties. The jury found for plaintiffs in the sum of two thousand dollars, and, having unsuccessfully moved for a judgment *non obstante veredicto* and for a new trial, defendants prosecuted this appeal from the judgment rendered on the verdict of the jury.

Between five and seven o'clock in the afternoon or evening of August 11, 1918, respondents Shelley and wife were driving their Ford automobile along the public highway north or west toward the town of Zillah, in Yakima county. This road ran in a general northwesterly and southeasterly direction. Mr. Shelley was at the wheel of the car, one Wilson was riding beside him, and Mrs. Shelley sat on the rear seat holding a child. Approaching them from the other direction just before the accident, was one McNeice, driving his Overland automobile. Behind him came appellants in their Buick automobile. One Elliott, stepson of Norman, was driving, a Miss Anderson was riding in the front seat with him, and appellants Norman and wife rode in the rear seat, Mrs. Norman holding her

two-year-old child. All three cars collided after Elliott had turned out to his left-hand side of the road, and had passed, or was attempting to pass, the McNeice car. Mrs. Shelley was thrown out of the car onto the roadway, and sustained a broken arm, bruises and other injuries. Her baby was thrown out and fell on the hood of the Buick car. Mr. Shelley was not thrown out of his car, but had two ribs fractured, his chest injured and his back and arm bruised and wrenched. The cars of both appellants and respondents were badly damaged.

The facts as to the cause of the accident must be gathered almost entirely from the testimony given by the occupants of the respective cars at the time of the collision. As is usually true in cases of this kind, the witnesses gave somewhat different versions as to the details of the accident.

At the point near Zillah, where this accident happened, the highway was twenty-seven feet wide, eighteen feet being surfaced with gravel and maintained by the county, and the remaining nine feet being of dirt, not surfaced, but covered somewhat with rock raked off the adjoining surfaced roadway. Witnesses for respondents testified that the graveled portion of the road was the more generally used; that there was a drop of from six to eight inches from that part of the road to the dirt portion; that there were stones in the dirt part and it was rough; that, between the two portions of the road and along this drop or embankment, some grass and thistles grew. On the other hand, it was testified that one part of the road was traveled about the same as the other; that it was all nearly level; that the dirt part may have been three or four inches lower than the graveled part, but that it merged right into it and there was no drop from one part to the other.

Respondents introduced testimony to the effect that, at the time of the accident, their car was traveling at a speed of from fifteen to eighteen miles an hour. Appellant Norman and his stepson, Elliott, testified that the Shelley car was coming at the rate of thirty miles an hour; that it was "wobbling" in its course, or "perceptibly wavering."

The witness Wilson testified that, when the Shelley car was about one hundred feet from the McNeice car, the Norman car came from behind the McNeice car, went clear over to the dirt part of the road—the left, or wrong, side of the road for the Norman car—and, while traveling at the rate of at least thirty-five miles an hour, cut diagonally across the road in front of the McNeice car. Opposed to this testimony is that of young Elliott, who said he was driving the Norman car at a speed of but twenty-five miles an hour as he went by the McNeice car, which was traveling along at about fifteen or eighteen miles an hour; that he started to get across in front of the McNeice car in order that he might get over on his right side of the road and be out of the way of the Shelley car coming. He said he was about opposite the McNeice car when he saw the Shelley car coming; then said he was a little ahead of the McNeice car when he saw the Ford car of the Shelleys; that the Shelley car was about one hundred feet away from his (the Norman car) when he turned it in front of the McNeice car and to his right; that he was then driving the Norman car at about twenty-five miles an hour; that, when he had passed the McNeice car, he slowed down the Norman car and put on the foot brake, "because I wanted to see what the other car (the Shelley car) was going to do." He then said that the Norman car was almost at a standstill when the cars came together. None of the occupants of the Norman car was thrown out, although one door

came open and some peaches spilled from the Norman car where they were being carried. According to this testimony, the McNeice car had been run up the incline off the traveled part of the highway and all three cars were together.

Mr. Shelley's version of what happened just before the collision is to the effect that, as he was driving along on his right-hand side of the graveled portion of the road, at a speed of from fifteen to eighteen miles an hour, the Norman car suddenly came in sight, on its extreme left-hand, or wrong, side of the road, on the dirt portion thereof; that for him (Shelley) to turn his car farther to the right would have meant to drop down the embankment onto the dirt portion of the road and run head-on into the Norman car, rapidly approaching along that part of the road. Confronted with this emergency, Shelley said he turned to his left.

Elliott, the Normans' driver, testified that he turned to his right to get on his right side of the road, probably fifteen or twenty seconds before the collision, and that he was at "a practical standstill" at the time the cars came together. If this were true, it hardly seems probable that Shelley would have deliberately turned his Ford car to his wrong side of the road and run into the Norman car. The jury did not take this view. The jury believed the testimony of the Shelleys and their witnesses and determined that the driver of the Norman car was negligent.

Appellants' first claims of error, (1) and (2), are that the court erred in permitting respondents, the Shelleys, and their witnesses, the occupants of the car at the time of the accident, to testify that there was not sufficient room for their car to pass to the right of the Norman car at the moment of meeting the Nor-

man car; for the reason that this called for nothing more than a conclusion on the part of these witnesses. We do not so consider it. It called for a mere matter of calculation. It would not be necessary in such a case to ask the witnesses, respectively, how wide the Norman car was, and how much space was left in the road to the right of the Norman car, and how wide the Shelley car was, and thus make it a matter of subtraction. It was perfectly proper to ask the witnesses whether there was room for one car to pass the other to the right in the roadway.

Appellants earnestly contend that the undisputed facts show that respondents were guilty of such contributory negligence as to defeat any recovery by them. The following language, which is quite pertinent here, was used in the opinion in the case of *Tooker v. Perkins,* 86 Wash. 567, 150 Pac. 1138:

"Much of the argument of appellants assumes that certain facts tending to show contributory negligence on the part of respondents were undisputed. Since the verdict of the jury, we must consider the facts resolved as presented by the respondents. Where there is conflict in the evidence, the facts are for the jury and, unless physically impossible or naturally improbable so that reasonable minds could not differ thereon, we are compelled to accept as conclusive all those facts which must necessarily have been resolved by the jury in respondents' favor."

It was also said in that opinion:

"And, as Mr. Tooker [plaintiff] testified, as it [defendants' automobile] came around the standing automobile in front of the Roycroft it had veered to the east to pass around it, and he assumed that it would pass east of him instead of west; that it then suddenly veered west, and it was all so quick it may be inferred that he could not tell where it was going, but attempted to throw his wife out of its way by thrusting her to the left and forward. There is no infer-

ence to be derived from this that the respondent [plaintiff] assumed that the automobile would be driven down the east instead of the west driveway, contrary to the law of the road, or that, acting on such assumption, he stepped into collision with it. Great stress is laid upon this detail by appellants, and it is strenuously insisted throughout their argument that respondents assumed that the car would be driven down the east driveway instead of the west driveway, contrary to the law of the road. Neither of the respondents testified that they did so assume, and *their actions as described by them, together with all the testimony, were questions of fact and inference for the jury, and we are unable to resolve this question as one of law.* Even if they had assumed that the car would pass down the east driveway instead of the west and had acted upon that assumption, if its motions were as sudden and as rapid as they testified, it would still have been a question for the jury to determine whether the appellants were negligent. As was stated in *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529:

"'Being in imminent danger, an emergency was presented, and whether, under this emergency, the respondent acted with due prudence is, under all the authorities, a question of fact for the jury. The law does not scrutinize too carefully an act done by one who has been put in a position of danger by the one who inflicts injury upon him, leaving it for the jury to say under such circumstances whether the act in seeking to avoid the danger was the act of an ordinarily prudent man.'

"See, also, *Van Dyke v. Johnson,* 82 Wash. 377, 144 Pac. 540."

The case of *Lloyd v. Calhoun,* 78 Wash. 438, 139 Pac. 231, is cited as an authority and discussed by both parties to this appeal. There, under circumstances similar to the instant case, the plaintiff recovered in the trial court and the Department of this court before which defendant's appeal was argued affirmed the

judgment. Judge Morris, in that case, wrote a dissenting opinion for the reasons stated in which, upon a rehearing *En Banc,* the action was reversed and dismissed. *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458.

In the majority opinion of the Department of this court, it was said in that case:

"It seems to us that the evidence was sufficient to warrant the jury in believing that appellant was negligent in proceeding at an excessive rate of speed, in running to the north side of the road, and in not seasonably turning to the right upon approaching respondent. Clearly, the evidence furnishes ample room for difference of opinion upon the question of appellant's negligence in each of these particulars.

"It is strenuously insisted that, in any event, respondent's negligence was the real proximate cause of the accident. *We are unable to so decide as a matter of law.* In view of the testimony tending to show appellant's excessive rate of speed, his running to the north side of the road, which would be to his left, his late turning to the right as he approached respondent, respondent's apparent honest belief, produced by appellant's action, that, as the situation then presented itself to him, it was not possible for him to turn further to the right without coming in collision with appellant's car, and the apparent impending danger requiring very prompt action; we think the jury had the right to decide, as a matter of fact, that respondent was not guilty of negligence, that he acted as a reasonable person would under the circumstances, and that appellant's negligence was the real proximate cause of the accident.

"It is argued that, had respondent proceeded on his course without turning in either direction, appellant would have missed him and passed to his left when he, appellant, turned to the right. We do not think the evidence is conclusive of this fact, but, even if it were, it is not now so much a question of what would have occurred had this course been pursued, but rather, what did appellant's negligent acts—and we are to assume that the jury believed they were negli-

gent—induce respondent, as a reasonable man, to do at the particular time. The court could not decide, as a matter of law, that respondent acted negligently under the circumstances as they then existed and appeared to him. If appellant's negligence was the cause of respondent's acting as a reasonable man, turning to the left, as the jury evidently found, respondent was, under the circumstances, absolved from obeying the law of the road and turning to the right. It must be conceded that a somewhat convincing argument can be made, as it has been by counsel for appellant, in favor of appellant upon this branch of the case. It may be that the court might disagree with the conclusions reached by the jury. But we think it cannot be said that there is no room for honest difference of opinion as to the negligence constituting the real proximate cause of the damages here involved. *This makes the case one for the jury and not for the court.*"

In the dissenting opinion in that case, the inquiry was suggested, why, if respondent turned to the left to avoid the collision with appellant, he did not turn to the right on the "smooth prairie," where there was no obstacle to prevent the safe driving of his machine. His excuse was the existence of telephone poles along the road; but the reasoning of the dissenting opinion was to the effect that there was ample distance within which to avoid a telephone pole on the smooth prairie. The writer of the dissenting opinion then said:

"*It is true that the verdict of a jury is conclusive upon contested facts,* but I find no conflict in any of these determinative facts."

Referring to the place of the accident which resulted in that action, the opinion said:

"At this place, the highway runs westerly across a level, open country, is unfenced, ungraded and undefined upon the ground except by tracks worn by vehicles."

It is evident that the court felt, in that case, that, as to the material facts which secured a reversal of that cause, there was no conflict. That is not so here. We are unable to say that conditions were such that Shelley should have turned his car farther to his right. The jury undoubtedly took that fact into consideration, as well as the fact of his turning to the left.

Appellants allege error in the refusal of the court to give the following requested instruction:

"It is the law of this state that every person operating a vehicle upon a public highway shall operate the same in a careful and prudent manner and so as not to endanger the life and limb of any person, and any person so using the highway shall, upon meeting another person, seasonably turn to the right of the center of the highway so as to pass without interference. A failure to comply with any of these requirements by the plaintiff S. R. Shelley when upon the public highway would constitute negligence, and, if you shall find that he failed to comply with any of these requirements your verdict will be in favor of the defendants.

"In determining the line that would constitute the center of the highway you are instructed that turning to the right of the center of the highway means the right of the center of that part of the highway whether gravel or a dirt road, which is at the time open and in a reasonably safe and fit condition for travel by the ordinary modes."

The court gave the substance of this instruction in other instructions, but modified the latter paragraph of the requested instruction and charged the jury as follows:

"In determining the line that would constitute the center of the highway, you are instructed that turning to the right of the center of the highway means the right of the center of that part of the highway, whether gravel or dirt road, which is contiguous and at the time open and in a reasonably safe and fit con-

dition for travel by the ordinary modes. If, however, the highway in question, which means the space from the fence on one side to the fence on the other, had upon it two or more beaten traveled tracks, one of them gravel and the other dirt, and if each had defined and well marked limits or boundaries, with a plain and distinct line of demarcation between them, the right of the center of the highway to one who was using one of these traveled tracks, in such an event would mean the right of the center of the track such person was at the time traveling."

We are of the opinion that, under such circumstances as might have been found by the jury in this case as to the condition of the legal highway, whatever may have been the difference between the gravel and the dirt road, if any, the above charge of the court was a correct charge.

Appellant also complains of the refusal of the court to give the following instruction:

"If you shall find that the defendants' car was being driven on the traveled portion of the highway and on the approach of plaintiffs' car and as soon as the person driving the defendants' car could with reasonable care and caution turn to his right and was in the act of turning to the right and the plaintiff S. R. Shelley failed to turn to his right and on account of said failure a collision occurred, then the plaintiffs cannot recover as it was the duty of the plaintiff, Shelley, to turn to his right as well as for the defendant."

This instruction was given in substance in the eleventh instruction of the court, as well as the first paragraph of the instruction of which the last paragraph was heretofore quoted, the eleventh instruction being as follows:

"It is not necessary to the exercise of due care on the part of the driver of an automobile that he anticipate that the driver of another car, which he is about to meet, will violate the law of the road by driving on

the wrong side of the highway. One who violates the law of the road by driving on the wrong side assumes the risk of such an experiment and is required to use greater care than if he had kept on the right side of the road. If a collision takes place under such circumstances, the presumption is against the party who was on the wrong side. But the presumption is *prima facie* and has the effect only of casting the burden of justifying his position upon the man who was on the wrong side.

"If you find that at the time of the collision the plaintiff was driving his automobile on his left of the center of the traveled part of the highway and that the driving of his car to the left of the center was the proximate cause of the collision, your verdict will be for the defendants, unless you further find by a preponderance of the evidence that plaintiff in turning his car to the left of the center of the highway, if he did so turn it, acted under an emergency such as would justify a reasonable man under like circumstances in believing that it was necessary to so turn his car to the left in order to prevent an imminent collision with the defendants' car, and the plaintiff must have honestly believed and have had reasonable ground to believe that such a course on his part was the only way to avoid imminent collision with the defendants' car. It was plaintiff's duty in meeting and passing defendants to seasonably turn to the right and he would only be excused from the performance of that duty upon the happening of an emergency in the nature of an apparent danger of collision with defendants' car in case he obeyed the law of the road and turned to the right. If at the time plaintiff turned his car to the left of the center of the highway, if he did so turn it, the defendants' car was far enough away so that a reasonable man under like circumstances would not honestly believe that a collision was imminent if the law of the road were obeyed, then the plaintiff would be negligent in turning his car to the left, and if doing so was the proximate cause of the collision, the plaintiffs cannot recover."

Appellants complain of the giving of the eleventh instruction, but we are satisfied that it accurately stated the law, and it was also on the whole very favorable to appellants.

Appellants also complain that the verdict was excessive, and of the instruction given by the court to the jury as follows:

"If your verdict shall be for the plaintiffs you will find what damages they have shown themselves entitled to by a fair preponderance of evidence as the proximate result of defendants' negligence, including the damage, if any, to their automobile, and the personal injuries, if any, to both Mr. and Mrs. Shelley, and such expense, if any, as was necessarily incurred for medical attendance and allow them such sum as will fairly compensate them for their injury."

The instruction of the court as to the measure of damages certainly stated the law correctly and for the very serious injury sustained by respondents and the damages to their car, proven to the jury, we would be very loath to say that two thousand dollars was an excessive award. It will stand.

There is a conflict in the testimony of appellants and respondents and the other occupants of their respective cars as to what happened and how it happened; and on the various versions of the accident, the jury resolved in favor of respondents. It follows from what we have said that we may not disturb the verdict of the jury.

The judgment is therefore affirmed.

PARKER, C. J., BRIDGES, MACKINTOSH, and FULLERTON, JJ., concur.

[No. 15952. Department Two. January 26, 1921.]

E. E. MAYER, *Respondent*, v. C. C. GIBSON, *as Treasurer of Lincoln County, Appellant*.[1]

SALES (85)—OPERATION AND EFFECT—TRANSFER OF TITLE—INTENT. Under the rule that the intent governs the passing of title, a definite quantity of wheat passed to the buyer January 20, at the time the contract was made and the price paid, although the contract provided that it was to be delivered f. o. b. cars at D. to be forwarded before April 1, where the wheat, part of a quantity of uniform quality sacked and stored in a warehouse, was inspected and insurance policies thereon immediately assigned to the buyer.

Appeal from a judgment of the superior court for Lincoln county, Truax, J., entered January 7, 1920, in favor of the plaintiff, in an action to remove a cloud upon title to land subjected to a tax lien. Reversed.

M. E. Jesseph, for appellant.
D. R. Glasgow, for respondent.

MITCHELL, J.—As of the date of March 1, 1917, twenty-five thousand bushels of wheat were assessed in Lincoln county as the property of E. E. Mayer. The taxes levied thereon not having been paid, the county treasurer in due time selected certain land owned by Mayer and charged it therewith. Thereafter, claiming he was not the owner of the wheat on March 1, 1917, he brought this action to have the cloud on the title to the land by the tax lien removed, and to enjoin the county treasurer from selling the land in payment of the tax. Trial in the superior court resulted in a judgment in favor of the plaintiff. The county treasurer as defendant has appealed.

The wheat was raised by George W. Hoffman and his two sons, E. Hoffman and George E. Hoffman, and stored by them in their private barn or warehouse at Davenport. Mayer and the owners of the wheat were brought together by John Hoffman, a brother of

[1]Reported in 195 Pac. 1.

George W. Hoffman. On January 19, 1917, George W. Hoffman, at that time in another county, authorized his brother, by telephone, to sell his interest in that amount of wheat; his part of the money, however, was to be placed with E. N. Imus, one of the bankers at Davenport. On the morning of January 20, 1917, Mayer, John Hoffman and George E. Hoffman went to the warehouse, at which time Mayer made an examination of the wheat. This is denied by him, but the proof is against him. It was so testified to by the other two, and Mr. Frazier, at whose office the deal was finally completed, testified that, while they were at his office, one of the parties—he thought it was Mayer—stated that the wheat had been examined by Mayer. The wheat was in sacks and consisted of several hundred sacks more than twenty-five thousand bushels. After examining the wheat, the parties went to the office of J. E. Frazier, an insurance agent, where the trade was completed. Mayer paid $40,000 cash and took an instrument in writing as follows:

"J. E. FRAZIER
"Insurance, Loans, Real Estate.
"Davenport, Washington.

"Received from E. E. Mayer, Spokane, Washington, the sum of forty thousand and no one-hundredths ($40,000) dollars, in full payment of Eight Thousand Four Hundred (8400) bushels Bart Wheat, and Sixteen Thousand Six Hundred (16,600) bushels of Bluestem Wheat now in the Geo. W. Hoffman grain warehouse on railroad of the Washington Central Branch of the Northern Pacific Railroad at Davenport, Washington, to be delivered to said E. E. Mayer, f. o. b. cars, Davenport, Washington, whenever the said E. E. Mayer furnishes cars before April 1st, 1917.

"Dated at Davenport, Washington, this 20th day of January, 1917. (Signed) George W. Hoffman,
"By E. N. Imus,
"E. Hoffman,
"George E. Hoffman."

The Hoffmans had insurance on the wheat which was immediately transferred, upon demand of Mayer, to himself as owner of the wheat. George W. Hoffman being absent, his insurance was canceled and in its stead a new policy issued to Mayer, while the other two Hoffmans, it seems, assigned their policies of insurance to him. In moving the wheat, the respondent procured the cars and had them spotted on the track by the warehouse, whereupon the wheat was weighed and transferred by him and the Hoffmans from the warehouse to the cars. The first two car loads were taken on February 8, 1917. The proof is silent as to where the two car loads were taken. The balance of the wheat was moved during the month of March, 1917.

The respondent testified that, in loading the wheat, he inspected it to see if it came up to the standard of number one wheat that it was represented to be at the time of his purchase, and that he found a substantial quantity which he refused to accept. On the contrary, and more convincingly that way, the proof shows that the wheat was of splendid quality, that it was sold without reference to grades, and all of those who helped load the cars, other than the respondent, that were witnesses at the trial testified that, while respondent at the last probably said something about the quality of some of the wheat, as a matter of fact he did not refuse to take a single sack of it as it was taken down, weighed and removed from the warehouse; and further, the uncontradicted testimony is that the wheat left in the warehouse consisting of several hundred sacks for seed purposes was of the same kind, character and value as that taken by the respondent, and a part of the same general pile that practically filled the warehouse.

Upon the question if title to the wheat passed on January 20, 1917, respondent places undue importance on the wording of the contract which calls for a certain number of bushels of wheat of one name and a given quantity of another name, from which it is argued that the necessity for segregation negatives the idea of a present sale and the consequent passing of title. If otherwise forceful, the argument is wholly deprived of merit by respondent's own testimony, for, in answer to questions by his counsel, he said:

"Q. Mr. Mayer, is that the correct proportion of the wheat as delivered, 16,600 bushels of Bluestem and 8,400 bushels of Bart; is that the way it was delivered to you?

"A. No, not quite. They gave me all of the Bart wheat they had, I think. It was—it made a difference, anyway; there was more of one kind than there was of another.

"Q. Not enough to make any difference to you?

"A. Well, it didn't make any difference to me because it was correct, the same anyway; one was worth just as much as the other, so I didn't care for that. But, of course, I kept it separate because it was sold separate, but there was more of one kind than what the ticket or contract called for, and less of another."

The answer to the controversy must be reached by ascertaining the intention of the parties. It is to be discovered not by some expressed afterthought or conclusion on the part of the respondent, but from the terms and conditions of the contract and the circumstances surrounding and attending the sale. The price was paid. Nothing remained to be ascertained or adjusted, to conclude what the rights of the parties were. The wheat had been examined by the respondent and left at the vendors' warehouse for respondent's convenience. He was entitled to immediate delivery of the property if he so desired. The total mass from

which quantity alone was to be separated, was identical in quality and uniform in value, so that the privilege of selection would not confer any advantage upon either party. A similar situation is tersely described and disposed of by the court of errors and appeals of New Jersey in a well-reasoned case upon this subject, viz.: *Hurff v. Hires,* 40 N. J. L. 581, 29 Am. Rep. 282, as follows:

"Nothing was left undone by the parties, except measuring out the quantity purchased from any part of the whole bulk—a ministerial act which might be done by either party, or by any stranger, as well as by the parties themselves."

The case of *O'Keefe v. Leistikow,* 14 N. D. 355, 104 N. W. 515, involved the sale of seventy bushels of flax not separated from a mass containing eighty-five one-half bushels by measurement and seventy-four bushels by weight. The question in the case was, "Was a separation from the mass, or the measuring of the seventy bushels, a condition precedent to the passing of the title to the defendant?" Deciding the question, the court said:

"It seems to be generally held that, if the property sold is mixed with other property not like in quality or size and a certain grade or quality only is sold, then the separation and selection is presumptively a condition precedent to the passing of title. It is also held in many cases that, if there must be measuring or selecting of certain kinds of property from a mass before the price can be ascertained, then no title presumptively passes. These rules are always subject to the intention of the parties. In this case the property was identified and ascertained. The subject-matter of the contract was specified as seventy bushels of flax on the Ops farm. The price was fixed. Delivery was not dependent on the payment of the price, but prepayment waived. Nothing was undetermined, or dependent upon measuring or weighing of the flax. The

mere fact that the seventy bushels were mingled with other flax is not of controlling importance, unless something was to depend upon the measuring. The evidence shows an intent to pass the title at once. There is nothing in the record to negative an intention on the part of the seller to part with the property, nor on the part of the buyer to accept it at once. The buyer and seller became tenants in common of the flax, each having the right to take his share therefrom. The following cases are in point on this question: Mechem on Sales, sec. 516; *Hurff v. Hires,* 40 N. J. Law, 581, 29 Am. Rep. 282; *Mackellar v. Pillsbury,* 48 Minn. 396, 51 N. W. 222; *Nash v. Brewster,* 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409; *Kimberley v. Patchin,* 19 N. Y. 330, 75 Am. Dec. 334; *Chapman v. Shepard,* 39 Conn. 413; *Hoffman v. King,* 58 Wis. 314, 17 N. W. 136; *Young v. Miles,* 20 Wis. 615; *Newhall v. Langdon,* 39 Ohio St. 87, 48 Am. Rep. 426; *Howell v. Pugh,* 27 Kan. 702; *Riddle v. Varnum,* 20 Pick. 280; *Straus v. Minzesheimer,* 78 Ill. 492; *Crofoot v. Bennett,* 2 N. Y. 258; *Welch v. Spies,* 103 Iowa, 389, 72 N. W. 548; *Waldron v. Chase,* 37 Me. 414, 59 Am. Dec. 56."

To the same effect is the case of *Nash v. Brewster,* 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409. It considers the question of preference between the payee of a seed-grain note and the lien of the lessor of premises upon which a crop of grain had been grown. The decision was in favor of the holder of the note. It was said:

"It is claimed that the seed was not furnished until after the execution of the note, because the 200 bushels therein described were a part of a larger quantity stored in the same bin, and was not separated or hauled away at the time. It is held in *Kelly v. Seely,* 27 Minn. 388, 7 N. W. Rep. 821, that the contract must be executed, and the sale completed, at the time the note is given. We have no doubt that upon the evidence, and for the purposes of the contract, the sale in this case must be deemed completed at the time of the execution of the note, and that, as between the

parties, at least, the title passed. The transaction appears to have been *bona fide,* and the evidence, which was uncontradicted, tended to prove that the wheat in the bin, of which the 200 bushels was a part, was all of the same kind, and Lovejoy had the same right to take that amount from the bin, and remove it, as he would if it had been separated. He was given permission to haul it away by the load and the plaintiff was in the meantime to be the bailee of the same. It was unnecessary to put the parties to the extra trouble of handling it twice in the granary, or to remove it all in one day. The evidence was sufficient to warrant the jury in finding that it was the intention of the parties that the title should presently pass, and in such cases it is a question of intention to be gathered from the circumstances. Weighing or measuring is not absolutely essential to a complete sale, except when necessary in order to define the subject-matter. *Winslow v. Leonard,* 24 Pa. St. 14. It might be more conclusive or satisfactory, but, if the evidence was sufficient to show the intention of the parties, and the vendee had the absolute right to take away the amount sold at the time, it is sufficient. *Burrows v. Whitaker,* 71 N. Y. 291; *Hatch v. Oil Co.,* 100 U. S. 124. Accordingly, though the authorities are not uniform, we think the rule is quite well established that, upon a sale of a specific quantity of grain, its separation from a mass, indistinguishable as to kind, quality, or value, of which it is a part, is not necessary to pass the title, where the intention to do so is otherwise made manifest. *Kimberly v. Patchin,* 19 N. Y. 330; *Russell v. Carrington,* 42 N. Y. 118; *Lobdell v. Stowell,* 51 N. Y. 70; *Chapman v. Shepard,* 39 Conn. 413; *Hurff v. Hires,* 40 N. J. Law, 581-586; 6 Amer. Law Rev. 450-458; 2 Schouler, Pers. Prop. § 258; 1 Benj. Sales, (Corbin's Notes,) § 395, etc. It was competent for the parties to make themselves tenants in common of the wheat in a particular bin by the sale of a part, and in such case the plaintiff might sever and take his own at any time. His legal rights were as well defined and complete as if his portion had been measured out and placed in a separate bin on plaintiff's premises, and in his care."

Other authorities to the same effect are *Seldomridge v. Farmers' & Merchants' Bank*, 87 Neb. 531, 127 N. W. 871, 130 N. W. 848, 30 L. R. A. (N. S.) 337; 24 R. C. L. 29, § 291; 35 Cyc. pp. 279, 336; Mechem, Sales, § 483.

The conclusion is the title to the wheat passed to the respondent on January 20, 1917, and that it was properly assessed as belonging to him. There is nothing in the record that fairly negatives this conclusion.

Judgment reversed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15912. Department One. January 31, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. GERHART M. JENSEN, *Appellant*.[1]

ROBBERY (7)—EVIDENCE—ADMISSIBILITY. It is a sufficient identification of a revolver, used in an attempted robbery, for the witness to testify that it closely resembles the one used by the accused and from its appearance witness believes it to be the same.

CRIMINAL LAW (448)—APPEAL—HARMLESS ERROR—EVIDENCE. Error in admitting in evidence a revolver thought to be the one used by accused in an attempted robbery would not be prejudicial, where it was similar to the one used.

APPEAL (143)—EXCEPTIONS—TO INSTRUCTIONS. A general exception to an instruction is not sufficient to raise the point that it should have been given in writing.

TRIAL (80)—INSTRUCTIONS—IN WRITING—NECESSITY. Rem. Code, § 339, requiring instructions to be given in writing is not applicable to ordinary admonitions, such as a statement that the jury has nothing to do with the punishment if accused is found guilty.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 7, 1919, upon a trial and conviction of an attempted robbery. Affirmed.

[1]Reported in 195 Pac. 238.

M. F. Ryan, for appellant.

Joseph B. Lindsley and *James Emmet Boyce,* for respondent.

BRIDGES, J.—The defendant has appealed from a judgment of sentence upon conviction for attempted robbery.

The first ground mentioned for reversal is that the evidence was insufficient to justify the case going to the jury, or the verdict rendered by it. The appellant's brief does not point out wherein the testimony is insufficient. We have, however, carefully read the statement of facts and find ample testimony upon which the verdict of guilty may rest. It would not serve any useful purpose to make a detailed review of the evidence.

A certain revolver was received in evidence as one of the respondent's exhibits. Appellant claims that this was error because the revolver was not identified. The complaining witness testified that, when the appellant attempted to rob him, he had a revolver which he used in such attempt, and that the revolver introduced in evidence closely resembled the one used by the appellant in the effort to commit his crime, and that from its appearance he believed it was the same revolver. This was a sufficient identification to permit the jury to consider the question.

But if it should be conceded that the identification was insufficient, that would not be a ground for reversal. It may have been material for the state to show that the appellant used a gun in his effort at robbery, but it would certainly be immaterial as to what kind of a gun he used, or whether or not the particular gun in court was the one he used.

The court instructed the jury in writing, but, after reading such instructions, someone connected with the trial suggested that it might be well to instruct the

jury that it had nothing to do with the punishment of the appellant if it found him guilty. Accepting this suggestion, the court orally informed the jury that it had nothing to do with the matter of the penalty which the appellant must suffer in the event of his conviction; that that was a matter entirely for the court after the verdict of the jury had been returned. Appellant now complains that this instruction was not made in writing. The only exception taken by the appellant is that shown immediately following this instruction, as given in the statement of facts, where these words appear: "to which instruction defendant excepts." The record fails to disclose that the appellant objected to this instruction because it was orally given. We think, therefore, that the exception is insufficient to raise the objection that the instruction was not made in writing as required by Rem. Code, § 339.

In the case of *Collins v. Terminal Transfer Co.*, 98 Wash. 597, 168 Pac. 174, the trial court suggested he would like to give a part of the instruction in writing and a part orally. The appellant there made no objection to so doing. This court said:

"In this state of the record, it seems plain that appellant cannot now be heard to say that the judgment should be reversed because of the failure of the court to instruct the jury in writing. . . . In these circumstances it would be unjust to permit appellant to go to the jury and attempt to secure a verdict in his favor, and then predicate error upon the failure of the court to instruct in writing if the verdict should go in favor of his adversary."

See, also, to the same general effect, *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406.

In the last cited case, after the trial court had read to the jury his written instructions, someone suggested something in addition, and the court proceeded to give

an oral instruction upon the matter requested. Neither party, to the action at the time, took exception either to the form or the manner of the instruction, nor requested that it be reduced to writing and given to the jury. Before the hearing of the motion for new trial, however, the appellant took exceptions to this oral instruction for the reason that it was not given in writing. The court said:

"The statute requiring instructions to be given in writing prior to the arguments of counsel to the jury, and requiring that they be sent to the jury room along with the pleadings and exhibits in the case, is not mandatory in the sense that the parties cannot waive the requirements. On the contrary, it is a common practice to waive some or all of them; and a party must be held to have waived them when he does not note his dissent at the time the breach of the rule is committed."

There is an additional reason why the judgment should not be reversed on account of this oral instruction. While the statute in question expressly requires that all instructions of the court shall be in writing, this court has consistently held that it has reference only to such instructions as concern the law of the case and does not refer to the ordinary admonitions of the court to the jury. The instruction here complained of falls squarely within those decisions. *State v. Marion,* 68 Wash. 675, 124 Pac. 125; *Maryland Cas. Co. v. Seattle Elec. Co.,* 75 Wash. 430, 134 Pac. 1097; *Raynor v. Tacoma R. & P. Co.,* 70 Wash. 133, 126 Pac. 91; *Collins v. Terminal Transfer Co., supra.*

It is further contended that the motion for new trial should have been granted because of misconduct of the deputy prosecuting attorney in the cross-examination of appellant and one of his witnesses. The appellant does not favor us by pointing out in detail the objec-

tionable portion of the cross-examination. We have, however, carefully read all of the cross-examination of these two witnesses. In each instance where the appellant objected to the cross-examination of which he complains, the court sustained his objection, but to much of the objectionable cross-examination the appellant made no objection whatsoever, and the court was not called upon to make any ruling. The result is that no error can be predicated on the cross-examination. The judgment is affirmed.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 15954. Department One. January 31, 1921.]

W. B. WHITE, *Appellant*, v. C. A. TURNER, *as Commissioner, etc., Respondent.*[1]

PLEADING (94)—DEMURRER—WAIVER. A demurrer is waived by consenting that the case be tried on the merits.

MUNICIPAL CORPORATIONS (45)—ORDINANCES—SUBJECTS AND TITLES. The title of a traffic ordinance expressly providing for the licensing of freight vehicles, is sufficient to embrace a section providing a tax upon motor trucks.

SAME (44)—ORDINANCES—VALIDITY. The provisions of a traffic ordinance are independent so that the validity of one does not affect the others, where (1) it required an occupation tax for motor trucks; (2) prohibited loads which permanently injured the streets; (3) fixed minimum loads; and (4) regulated their speed.

SAME (353)—USE OF STREETS—REGULATION OF MOTOR TRUCKS—VALIDITY. A traffic ordinance imposing upon motor trucks an occupation tax, graduated according to the load, is valid; Laws 1919, p. 124, § 34, expressly authorizing local authorities to levy an occupation tax.

SAME (353)—VALIDITY—VIOLATION. A traffic ordinance prohibiting the use of motor trucks which permanently injure the street and also loads of more than 24,000 lbs. is enforcible; and the same

[1]Reported in 195 Pac. 240; 197 Pac. 609.

is violated by permanent injury to the streets regardless of the weight of the load.

SAME (353)—VALIDITY. The fact that Rem. Code, § 5561-4, exempts cities of the first class from the provision of the traffic law forbidding the use of all trucks that permanently injure the streets, does not prevent a city of the first class from passing a traffic ordinance forbidding such use.

ON REHEARING.

JUDGMENT (189) — CONCLUSIVENESS — JUDGMENT ON DEMURRER. Where the sole purpose of an action was to test the validity of an ordinance, and a demurrer to the complaint was sustained for the reason that the major portion of the ordinance was valid, the judgment dismissing the action did not involve any question as to a violation of the ordinance.

Appeal from a judgment of the superior court for Snohomish county, Brawley, J., entered March 15, 1920, dismissing an action for an injunction, after a hearing before the court on the merits. Modified.

Cooley, Horan & Mulvihill, for appellant.

R. J. Faussett and *J. W. Dootson*, for respondent.

BRIDGES, J.—By this action the plaintiff sought to enjoin the defendant from interfering with his use in a certain manner of some of the streets of the city of Everett. The complaint alleged that that city is a municipal corporation of the first class, and that the defendant was its duly elected, qualified and acting commissioner of public safety; that plaintiff is engaged in the business of hauling saw logs loaded on trucks and trailers, from a point north of Everett to and through that city; that he owned the timber on a certain tract of land, which would be lost to him unless he was able to remove it within a stated short period, and that the only practical way of removing such timber was by trucks and trailers, used in the manner he was using them; that he had a large sum of money invested in such timber and trucks, and that any interference with

his logging operations would irreparably injure and damage him; that he operated, for the purposes mentioned, two three-and-a-half-ton trucks and one three-ton truck and one one-ton truck, together with three Los Angeles trailers; that he had paid all license fees required by law to be paid to the county of Snohomish and to the state of Washington; that each truck and trailer combined and unloaded weighed approximately six tons, or twelve thousand pounds; that it was impracticable to operate such trucks and trailers without hauling at least two thousand four hundred feet of logs per load, and that the rate capacity of the trailers was nine tons and their licensed capacity five tons, as licensed by the state of Washington; that the rate capacity of each truck was three and a half tons and their licensed capacity, as licensed by the state, five thousand pounds. The complaint further alleged that, on or about the 3d day of March, 1920, the city of Everett enacted and put into force Ordinance No. 1908, and that the defendant threatened to and would stop his use of the streets in the manner necessary to him, and threatened to and would arrest plaintiff by virtue of such ordinance unless enjoined, and that the tax imposed by such ordinance was confiscatory, arbitrary, oppressive, unreasonable and discriminatory, and if the ordinance was enforced it would suppress his business. The ordinance is made a part of the complaint by exhibit attached thereto. The title and sections 1, 2, 3 and 4 of the ordinance are as follows:

"An ordinance providing for the use, protection and preservation of the public streets, roads and highways within the city of Everett, and for the licensing and operation and speed regulation of freight vehicles thereon, prescribing penalties for the violation thereof, and declaring an emergency.

"The city of Everett does ordain:

"§ 1: It shall be unlawful for any person to drive, propel, draw, move, convey or transport, or cause to be driven, propelled, drawn, moved, conveyed or transported, over, upon, along or across any public street, road or highway within the corporate limits of the city of Everett, any vehicle or object which, with or without its load, shall be of such weight, or which shall have any wheel or tire so made, constructed, formed or shaped, or so equipped with spikes, cleats, lugs or other attachments or projections, as to destroy or permanently injure such street, road or highway or the surface, foundation or other part thereof, and it shall be unlawful for any person to drive, propel, draw, move, convey or transport, or cause to be driven, propelled, drawn, moved, conveyed or transported over, upon, along or across any public street, within the corporate limits of the city of Everett, any automobile, auto truck or motor propelled vehicle or truck or trailer or truck and trailer which, with or without the load, shall weigh more than twenty-four thousand pounds.

"§ 2: It shall be unlawful for any person, persons or corporation to drive, propel, draw, move, convey or transport or cause to be driven, propelled, drawn, moved, conveyed or transported over, upon, along or across any public street within the corporate limits of the city of Everett any truck or trailer, or any truck and trailer, with or without load, which shall weigh more than its licensed capacity, but in no event shall said truck or trailer or truck and trailer, with or without its load, weigh more than twenty-four thousand pounds.

"§ 3: For the purpose of this ordinance the licensed capacity shall mean the capacity as rated by the manufacturer of the vehicle.

"§ 4: Every person, corporation or association operating any motor truck or trailer or motor truck and trailer over the public streets of the city of Everett, as set out in Section 1, shall first pay into the city treasurer of the city of Everett, an occupation tax per annum and procure a license therefor from the city clerk, as follows:

Motor trucks:—
Weighing 1,500 pounds or less.....$10.00
Weighing more than 1,500 pounds and not to exceed 6,500 pounds.....$10.00
And forty cents per hundredweight for all in excess of fifteen hundred pounds, and in addition thereto, forty cents per hundredweight at the rated capacity load. Weighing more than six thousand five hundred pounds, ten dollars and fifty cents per hundredweight for all in excess of fifteen hundred pounds, and in addition thereto fifty cents per hundredweight at the rated capacity load. Trailers used as trucks shall be classified and rated as, and shall pay the same fee as hereinbefore provided for motor trucks of like weight and capacity. . . ."

Section 5 is with reference to the speed of motor trucks, and § 6 fixes the penalty for violation of the provisions of the ordinance.

It would appear from the judgment entered in the case that, on the filing of the complaint, the court issued a temporary restraining order, and an order requiring the defendant to appear and show cause why it should not be made permanent. Neither of these orders, however, appear in the record before us, nor does the record contain any formal answer to the complaint; but the defendant caused to be filed in the case three affidavits, the substance of which is, that he denied that he had threatened to interfere with the plaintiff while lawfully using the streets of Everett; that, in his logging operations, the plaintiff has at various times hauled on the streets of Everett logs which, together with the vehicles on which they were loaded, weighed approximately thirty-five thousand pounds, and that the use being made by the plaintiff of the streets of Everett, because of the weight of the loads, has caused such streets to be broken up and permanently greatly impaired; and that, if the plaintiff be

permitted to continue to carry on his business and to use the streets of Everett in the manner he was using them, they would be entirely destroyed. The court seems to have tried the case upon the complaint, the ordinance, the three affidavits filed by the defendant, and the licenses issued by the state to the plaintiff. There does not appear in the record any other evidence or any testimony. The judgment recites that the court proceeded to hear the cause upon the evidence last above mentioned, and adjudged that the ordinance was good and valid, and that the temporary restraining order theretofore issued be vacated and dissolved and that a permanent injunction be denied. The judgment also sustains an oral demurrer to the complaint and, plaintiff refusing to further plead, dismisses the action. From this judgment, the plaintiff has appealed.

It would appear that the judgment was against the plaintiff both because his complaint failed to state a cause of action, and because, after a trial, it appeared that the action should be dismissed for want of merit. Without doubt, when the defendant consented that the case be tried upon its merits, he waived his demurrer, and we shall, therefore, treat the judgment as one dismissing the action after hearing upon the merits.

In this court practically all of the provisions of the ordinance have been attacked and defended without any question being raised as to the sufficiency of the pleadings in that regard.

We shall not find it necessary to pass upon all the provisions of the ordinance, nor all of the objections made thereto. The showing made by the respondent was that the appellant was ruining and destroying certain of the streets of Everett, and that such damage was being caused by reason of the heavy loads which he was hauling over them. There is nothing either in

the complaint or in the showing made by the appellant to deny these charges of damage. We, therefore, must consider that the appellant, by the use made by him, has greatly damaged and permanently injured those streets in the city of Everett over which he has been hauling logs.

The appellant contends that the title to the ordinance is defective for the reason that it does not in any way refer to the tax provided for in the ordinance. We do not think there is merit in this contention because the title of the ordinance expressly provides for the licensing and operation of freight vehicles. It is the general rule that, if the title shows the general character of the ordinance and thus prevents its enactment being fraudulently accomplished, it will be held to be sufficient, and that the title is not intended to be a glossary of the contents of the act. 2 McQuillin, Municipal Corporations, p. 1484; *State ex rel. Cole v. New Whatcom,* 3 Wash. 7, 27 Pac. 1020.

The ordinance is easily divided into four independent parts: (1) That part which requires that all persons operating motor trucks or trucks and trailers over the streets of Everett, shall pay a designated occupation tax; (2) that part which prohibits the hauling of any load which, because of its weight, destroys or permanently injures the streets; (3) that part which undertakes to fix the maximum weight of truck and load or of load: (4) that part which fixes the speed of trucks carrying loads of designated amounts.

Each of these four divisions is so independent of the others that anyone might be declared valid and enforcible, though all the others might be invalid and unenforcible. We will consider the validity of such of these divisions as we consider necessary for the determination of the case.

We are wholly unable to see any valid objection to that part of the ordinance with reference to occupation tax. The tax imposed is graduated according to weight, capacity or load; it applies generally to all motor trucks and trailers; there is no discrimination. The wording of the ordinance provision with reference to occupation tax is identical with the wording of the 1919 statute providing for a license fee to be paid to the state on motor trucks. Laws of 1919, p. 90, § 1. Nor is this provision of the ordinance in violation of Laws of 1919, p. 124, § 34, concerning the powers of local authorities, for that section expressly authorizes the local authorities to levy an occupation tax.

Section 1 of the ordinance provides that,

"It shall be unlawful for any person to drive . . . upon . . . any public street . . . within the corporate limits of the city of Everett, any vehicle or object, which, with or without its load, shall be of such weight . . . as to destroy or permanently injure such street . . . or the surface, foundation or other part thereof . . ."

The remainder of this section makes it unlawful to drive on the streets any motor propelled vehicle which, with or without its load, shall weigh more than twenty-four thousand pounds. Under this section, no vehicle may lawfully be driven over the streets when, because of the weight, it destroys or permanently injures them, and in no event shall the vehicle, together with its load, weigh more than twenty-four thousand pounds. We have seen that appellant's trucks were destroying and permanently injuring the streets; consequently, he was violating the ordinance regardless of the weight of his trucks, trailers and loads, for the ordinance did not permit him to use a truck which, together with its load, weighed to exceed twenty-four thousand pounds, whether or not he injured the streets.

We further hold that the provision of the ordinance with reference to permanent injury of the street is valid and enforcible. This portion of the ordinance is a copy of Rem. Code, § 5561-4 (Laws of 1915, p. 65), except it is made applicable to Everett, which is a city of the first class, whereas the statute exempts from its operation cities of the first class. But the fact that the statute does not make this provision applicable to cities of the first class is no argument against the validity of this portion of the ordinance. The statute left the matter open to those cities. They might by ordinance make its provisions applicable to them if they chose to do so. Nor is this provision in the ordinance in violation of Laws of 1919, p. 124, § 34, concerning the power of local authorities over these matters, because the ordinance provides "regulations governing traffic in addition" to the provisions of the statute, as that section of the statute authorizes, and is not in conflict with any statutory provision. In short, we hold that any city may lawfully enact and enforce ordinances which prohibit any vehicle which, with or without its load, because of the weight, destroys or permanently injures the streets.

We do not discuss the validity of that part of the ordinance which has to do with the speed of motor trucks because the record does not properly bring it before us, and for the further reason that its discussion is not necessary to the decision of this case. The same may be said with reference to the provision in regard to the weight and the load. If it should be considered that the maximum weight and load provisions of the ordinance are void for some reason, yet the appellant's action must be dismissed, because he has violated other valid provisions of the ordinance.

This view makes it unnecessary to determine the validity of those provisions with reference to speed

and maximum weight and load. But the judgment of the trial court went further than proper or necessary, and decided that all provisions of the ordinance were valid.

The judgment is reversed and the case remanded with directions to set aside the present judgment and make and enter another which will do nothing more than dissolve the temporary restraining order, refuse to give any permanent injunction and which will dismiss the action. Neither party will recover here any costs of the other.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

ON REHEARING.

[Department One. April 25, 1921.]

PER CURIAM.—A petition for rehearing and the answer thereto are before us. We desire to make some slight modifications in our previous opinion. The purpose of this action was to enjoin the respondent, who is an officer of the city of Everett, from putting into force against appellant any portion of a certain ordinance of the city of Everett with reference to the use of the streets. This ordinance was copied into and made a part of the amended complaint.

It would appear that, at the commencement of the suit, the court made an order temporarily restraining the respondent, as prayed for, and at the same time directed the respondent to appear and show cause why the temporary restraining order should not be made permanent. The first appearance of the respondent, in answer to the order to show cause, was by some affidavits which set up that the appellant had been, and was, so using the streets of Everett as to permanently injure and destroy them. The respondent next ap-

peared by a general demurrer to the amended complaint. The next thing that appears in the record is a judgment which, upon its face, has all the indications of a final judgment after a hearing upon the merits. These are all the proceedings had in the lower court. In our previous opinion, we treated this judgment as a final one upon the merits, and in so doing upheld the ordinance and found that the use being made by the appellants of the streets was such as to permanently injure them, in violation of the ordinance.

The appellant now contends that we have misconstrued the judgment and that its intention was only to dissolve the temporary restraining order theretofore issued and sustain the general demurrer to the amended complaint and, the plaintiff having elected not to plead further, dismiss the action. In other words, he now contends that the case was not heard upon the merits and that the trial court did not intend to adjudge that he had so used the streets as to permanently injure them. Although the record is in such condition as to easily lead to the conclusion that the case had been disposed of on its merits, a re-examination disposes us to accept appellant's view in this regard. So looking at the case, the substance of the previous opinion still stands. For the sake of clarity, let us suppose that the only things now before us are the amended complaint, with the ordinance attached thereto, a general demurrer, an order sustaining the demurrer, the refusal of the plaintiff to plead further and a judgment dismissing the action. The sole purpose of the action was to test the validity of the ordinance. If it should be held invalid, then a permanent injunction should issue prohibiting its enforcement; but if it, or any portion of it, be held valid and subject to enforcement, then the demurrer to the complaint

should have been sustained and the action dismissed. The effect of our previous opinion was to support at least the major portion of the ordinance and leave it subject to be enforced. Such being our holding, the necessary result must be that the trial court was right in sustaining the demurrer to the complaint, because if the ordinance was good, then appellant is not entitled to any relief in this action. Viewing the case in this light, it is not one which involves any question whether the appellant has violated the ordinance.

Our conclusion is that the judgment sustaining the demurrer and dismissing the action should be, and is, affirmed. Whatever we said in our previous opinion tending to indicate that the appellant had violated the terms of the ordinance, by using the streets in such a way as to permanently injure or damage them, is hereby eliminated. All other portions of the opinion will stand and the judgment appealed from is affirmed.

[No. 16073. Department One. January 31, 1921.]

LEE FRENCH *et al., Respondents,* v. C. D. & E. INVESTMENT COMPANY *et al., Appellants.*[1]

CANCELLATION OF INSTRUMENTS (6, 7)—VENDOR AND PURCHASER (60, 159)—RESCISSION FOR FRAUD. An executed contract for the sale of land may be rescinded for fraud entering into the making of the contract, and the purchaser's remedy is not limited to a suit at law for damages for breach.

CANCELLATION OF INSTRUMENTS (7) — EXECUTED CONTRACTS. Where arid lands and water rights in a contract for conveyance are dependent, one upon the other, a deed of the land alone does not make it an executed contract, and bar a cancellation.

WATERS AND WATER COURSES (65)—CONVEYANCES—RIGHTS APPURTENANT TO LAND. Where a vendor contracted to give a deed of land "together with a perpetual water right appurtenant to and laid in the S. canal," fixing a separate price for the water rights, a deed of the lands alone does not pass the water rights as an appurtenance.

[1]Reported in 195 Pac. 521.

VENDOR AND PURCHASER (88-93) — PERFORMANCE OF CONTRACT—DEPENDENT COVENANTS. Under a contract for the sale of arid land together with certain water rights, the land and water were dependent one upon the other, and the contract cannot be fully performed as to one part without the other.

SAME (73)—RESCISSION OF CONTRACT—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action to rescind a contract for the sale of land and certain water rights, in which the defendants admit an inability to convey the water rights, the question of fraud in the making of the contract is immaterial.

SAME (159-173)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—PARTIES LIABLE. Where, after making a contract for the sale of land, the corporation changed its name, and a new company of the old name was formed, taking over part of the old assets, and received all the payments made by plaintiff, turning them over to the old company, all without the knowledge of the plaintiff, both companies are properly held liable to plaintiff on rescission of the contract.

SAME (74)—RESCISSION OF CONTRACT—ACTIONS—NATURE AND EXTENT OF RELIEF. In an action to rescind a sale of land, in which the purchaser sought recovery of the purchase price and tendered a reconveyance, but failed to keep the tender good by bringing the deed into court, judgment for the plaintiff should provide for a reconveyance of the property.

Appeal from a judgment of the superior court for King county, French, J., entered February 6, 1920, upon findings in favor of the plaintiff, in an action for rescission, tried to the court. Modified.

Hartman & Hartman, for appellants.

Black & Black, for respondents.

BRIDGES, J.—In April, 1910, the appellant, Calhoun, Denny & Ewing, a corporation, and Lee French, of Everett, Washington (for the benefit of himself and his wife), entered into a written agreement whereby the corporation undertook to sell, and the individual to purchase, a certain tract of land and certain water

rights, which lands are located in Benton county, Washington, and are within the Government Sunnyside Canal district.

The property contracted to be sold is described in the agreement as follows:

"Tract twenty-three (23) of Crown Point Orchards, according to the recorded plat thereof on file in the office of Calhoun, Denny & Ewing, together with a perpetual water right appurtenant to said lands, in the Sunnyside canal, for the use of water for irrigation of said land and for domestic use incidental thereto, as hereinbefore provided."

The contract then recites that the purchase price of the land is to be $1,486.80, a portion of which is paid down in cash, and the balance to be paid in equal annual installments, with interest. The purchase price of the water right is fixed in the contract at $529.20, a part of which is paid in cash, the remainder to be paid in equal annual installments. The contract further provided that, in addition to the payments for water rights, the purchasers should pay to the vendor $9.60 per annum, "the same being a maintenance fee or charge for the use of water on said land." The last mentioned annual payments were required to be made until the purchase price of the land and water right had been fully paid. In other respects the contract was the usual one for the sale of lands.

The purchasers regularly paid the annual sums required by the contract, and ultimately all payments as therein provided were made. Thereafter the vendors made, executed and delivered to the vendees a deed conveying the title to the lands, but this deed did not make any mention of the water rights. Based upon these general facts, the vendees, as plaintiffs, brought this suit against the vendor and others, as defendants, to recover the money paid under the contract.

The complaint is exceedingly long and we can do nothing more than give a brief summary of its contents. It alleges in a general way all of the facts which we have heretofore recited. It further alleges that the plaintiffs, at the time of making the contract, were residents of the city of Everett, which was more than one hundred and fifty miles distant from the land described in the contract; that, after having made all of these payments, they discovered for the first time that the vendor was not the owner, at the time of the making of the contract, of the water rights therein mentioned, and had never since become the owner thereof, and that under the rules and regulations of the government, it could never become the owner of such water rights, and that the plaintiffs could never become the owner thereof and were not entitled to make application therefor, unless they gave up their residence in the city of Everett and resided on the land, or within fifty miles thereof, and that they were not willing to make these sacrifices; that the vendor had been guilty of fraud in the making of such contract in that it knew it did not have, and would be wholly unable to obtain, the water rights mentioned in the contract, and would never be able to comply with the contract in that regard; and that, in making the contract with this knowledge, it had been guilty of misrepresentation and fraud and that, had the plaintiffs known that the vendor did not have, and could not obtain, these water rights, they would never have entered into the contract.

The complaint further alleged that the land was practically valueless without the water for irrigation purposes, and that prior to the bringing of the suit, the vendor had delivered to the plaintiffs a deed to the title to the land described in the contract, and that they had made and executed a deed from themselves to the ven-

dor, reconveying to it any and all interest which they may have obtained by virtue of such deed, and tendered the same to the vendor who refused to accept it. They sought relief against the defendants in the sum of two thousand nine hundred dollars, being the amount they had paid for the land and the water right, together with interest thereupon and for a rescission of the contract.

In brief, the plaintiffs charge that the vendor agreed to sell them certain land and also certain water rights, and that the whole purchase price has been paid and the land has been deeded to them, but that the vendor has not conveyed and cannot convey to them the water right because it does not own it and cannot acquire it, and that the vendor has been guilty of fraud, and they seek to recover the money paid by them.

It will not be necessary here to give the substance of the answers of the various defendants because, in the further discussion of the case, their defenses will clearly appear.

The suit was tried to the court as an equity case. Judgment went in favor of the plaintiffs and against the defendants C. D. & E. Investment Company, a corporation, and Calhoun, Denny & Ewing, a corporation, in the sum of three thousand and sixteen dollars, and dismissed the other defendants out of the case. The defendants against whom the judgment ran have appealed.

At the outset there seems to be a great deal of discussion and confusion concerning the character of action the respondents were entitled to bring, if any, and the character of the case they have brought and the manner of its trial.

A recurrence to some fundamental principles will, we think, tend to lead us in the right direction. The

appellants contend that, inasmuch as they had given a deed to the respondents conveying to them the title to the land, they cannot maintain a suit in equity to rescind the contract and recover the purchase money paid, but that their entire right of action, if any, is for damages based upon the covenants in the deed. The authorities seem to lay down the following rules: Where a contract for the sale of land has been executed by the delivery of instruments of conveyance, as provided in the contract, then the purchaser's right of action must always be by a suit at law for damages, based upon a breach of the covenants of the deed. There is, however, one well defined exception to this rule, and that is that an executed contract may be rescinded and the amount of the purchase price recovered by a suit in equity where it is alleged and proven that fraud entered into the making of the contract. It is very generally held that executory contracts for the sale and purchase of real estate may be rescinded by a suit in equity, either on account of fraud or misrepresentation entering into the execution of the contract, or where it becomes apparent that the vendor is and will continue to be unable, or has failed, to comply with his contract. We deem it unnecessary to extensively cite authorities upon these fundamental principles. We do nothing more in that regard than cite 27 R. C. L. pp. 623, 626, 650.

We gather from the record that the respondents had one theory concerning the manner of the trial, the appellants had another, and the trial court had still a third. The respondents sought to prove, among other things, that the contract sued upon provided for two things, to wit, the land and the water rights and that, at the time of making the contract, the appellants were guilty of fraud and overreaching in representing to

them that they could deliver to them the right to use the water from these Sunnyside irrigation canals.

The trial court, however, held that such testimony was not only immaterial, but was incompetent because it would tend to vary the terms of the contract, which it decided were clear and certain. On the other hand, the appellants sought to introduce evidence tending to show that, before the contract was entered into, they had fully informed the respondents concerning these water rights and how they might be acquired, and that they would have to make application to the government therefor, and that the moneys necessary to be paid on such application would be furnished by appellants, and that the water moneys provided for in the contract were for that purpose. But the trial court again held that such testimony was incompetent and refused to receive it, saying, time and time again, that the contract spoke for itself, and that by its terms the appellants had agreed to sell not only the land, but the water right also, and that they now conceded they did not own, and could not convey, the latter, and that there was nothing else to the case. At the trial, it seemed to be conceded by the appellants that they did not own the water rights separate from the land, and could not give the respondents any separate and independent title to such water rights. This brings us down to the fundamental question in this case and that is, whether the giving of the deed by appellants to respondents made this an executed contract. If it did, and the question of fraud was properly eliminated by the court, then the action must have been one at law, based on the covenants of the deed, and the present action cannot be maintained.

The appellants seem to argue that, since the contract provided for the sale of the land, "together with a

perpetual water right appurtenant to said lands, in the Sunnyside canal . . .," the deed to the land carried with it the water right as appurtenant thereto, just the same as a deed to land will transfer the title to any permanent improvements on the land, or to anything appurtenant thereto and that, consequently, the contract had been executed.

We cannot agree with this contention. It is plain to our minds that the water rights which appellants contracted to convey were something different from the ordinary appurtenances to land and the mere fact that the contract speaks of the water right as being appurtenant does not make it so. If, as appellants argue, a deed conveying the title to the land would carry with it this water right, then, why all the separate and independent provisions in this contract with reference to the water right? Why were the water rights mentioned at all? Why, otherwise, did the contract not fix a total sum for the land and all appurtenances and agree in the usual manner to convey the title to the land? The mere fact that the contract expressly provides the purchase price for the water right separate from that of the land itself, is sufficient to show that the parties understood that the water right was not such an appurtenance as would be carried by a deed conveying the title to the land. There is enough in the record to show this land, because it was within the district of the Sunnyside canal, was entitled ultimately to receive waters from such canal for domestic and other purposes, but that, in order to acquire the right to obtain such water, application must be made to the government, and that certain payments had to be made to the government therefor before the right to obtain the water could be had, and that this application could be made only by an individual who resided either on, or within fifty miles of the land.

The deed, doubtless, had the effect of conveying to the respondents the right to make application to the government for water rights, but it did not and could not convey the water right because it was something distinct from the land. The right to make application to the government for the use of this water is one thing, and the right to use the water is an entirely different thing. It was the former that the deed to the land carried, and it was the latter that the appellants contracted to deliver.

But appellants further contend that, in any event, those portions of the contract which agree to convey the title to the land and to the water rights are separable and independent, and the respondent, having obtained a confessedly good title to the land, could, under no circumstances, recover more than the amount they had paid for the lands, whereas the lower court had permitted them to recover also what they had paid for the water right. We do not agree with this contention. The testimony very conclusively shows, and the trial court announced himself as being well satisfied in that respect, that the land was of little or no value without the water, and, of course, the water was of no value to the respondents without the land. They are absolutely dependent one upon the other. The provisions for their purchase and their purchase prices were contained in one and the same contract. It cannot be said, therefore, that the contract had been fully performed in any respect, either as to the land or as to the water right.

The conclusion to which we have come is not in violation of the principles laid down by this court in the cases of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; *Spokane Canal Co. v. Coffman,* 54 Wash. 645, 103 Pac. 1106;

Benham v. Columbia Canal Co., 74 Wash. 110, 132 Pac. 884. In the case last cited, a contract was entered into whereby the vendor agreed to sell a five-acre tract of land, "together with the appurtenances thereto belonging and the water right for the same." The contract further provided that the water right mentioned was water which the vendor agreed, under certain circumstances, to deliver on the land for the use of the purchaser. It was very properly held that the contract to furnish the water was entirely independent of the contract to convey the title to the land, and that the purchaser's right of action was against the vendor to require him to live up to the terms of the contract.

The facts in the other cases are similar to those in the *Benham* case. In the *Crampton* case the contract agreed to convey the title to certain lands for a specific consideration, and it further provided that the vendor would, free of cost to the purchaser, put in certain cement sidewalks and sewer and water mains within one year from the date of the contract. It was very properly held that the agreement to make these repairs was entirely independent of the covenants for the sale of the lands.

A case much more like the one at bar is that of *Ihrke v. Continental Life Ins. etc. Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F 430. The contract there provided for the sale of certain lands for a named consideration, and the vendors further agreed to plant the tract of land sold to certain fruit trees and to cultivate the same for a certain period. This court held that the contracts to sell the land and to plant it to orchard were not severable.

We therefore conclude that the contract was not an executed one, and that the purchaser had a right to maintain this action in equity for the rescission of the contract, regardless of any fraud.

We are also of the opinion that the trial court was correct in his holding that the question of fraud, although alleged, was not in the case. It is plain that, by the terms of the contract, the appellants were to sell and convey the title to two dependent things, to wit, the land and the water right; and since they admitted in this case they had not complied with and could not comply with that portion of the contract with reference to the water right, the matter of any representations made or knowledge by the purchaser at, or prior to their entering into the contract, would be immaterial, if not incompetent, as tending to vary and contradict the terms of the contract.

The case resolves itself into a very simple question and that is, that the appellants agreed to sell something the title to which they are unable to deliver, and we do not see any escape from the conclusion that the respondents are entitled to rescind and recover the purchase money paid by them, together with interest.

The judgment went against C. D. & E. Company and Calhoun, Denny & Ewing Company. It is claimed that it was error to give judgment against the latter. The names of the various companies are confusing. The original company was called "Calhoun, Denny & Ewing," a corporation. It was this company which made the contract involved here. Thereafter it changed its name to "C. D. & E." Company. At the same time a new corporation was formed under the name of the original or parent company, to wit, "Calhoun, Denny & Ewing" Company. In the transactions the C. D. & E. Company obtained a large portion of the assets formerly owned by the original Calhoun, Denny & Ewing Company, including the land here involved, and the remainder of the assets went to the new corporation, to wit, Calhoun, Denny & Ewing Com-

pany. But respondents did not know of these changes of names and formation of new companies till about the time they brought this suit. They made all their payments to the new Calhoun, Denny & Ewing Company, supposing it to be the company which made their contract. This new company accepted their money and gave them its receipt therefor. The record shows, however, that this new company paid all sums so received to the C. D. & E. Company, of which fact, however, the respondents had no knowledge. Under these and other facts shown by the record, we think the judgment was properly given against both companies.

However, the judgment, as it is, cannot stand. It allows respondents to recover a certain sum of money but made no provision whatever concerning the land. As the case now stands, the respondents have the title to the land and also a judgment for all of the money which went to pay for it. Manifestly, this situation cannot be upheld. It is true the complaint alleges, and the testimony shows that, prior to the bringing of the action, the respondents tendered the appellants a deed conveying any interest in this land which they may have obtained, on condition that the purchase money be returned, and that the appellants refused to accept the deed or return the purchase money; but so far as we can find from the record, the respondents have not kept their tender good, because they did not bring their deed into court.

If, within thirty days immediately following the filing of the remittitur in the lower court, the respondents make good their tender of the deed by depositing the same in this cause, with the clerk of the superior court, for the appellants, the judgment appealed from will stand affirmed; otherwise it is reversed and the case remanded with directions to dismiss the action.

Neither party shall recover of the other any costs of this appeal.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16125½. Department Two. February 2, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM PARKER, *Appellant*.[1]

CRIMINAL LAW (444)—APPEAL—HARMLESS ERROR—RULING AS TO INFORMATION. Error cannot be predicated upon refusing to strike from an information for seduction allegations of persuasion and fraudulent means, as to which no evidence was given, where the opening statement of the prosecuting attorney limited the means of seduction relied on to the promise of marriage; Rem. Code, § 2137, making the law relating to civil trials applicable, and Id., § 339, requiring plaintiff to state the cause of action and evidence to sustain it.

INDICTMENT AND INFORMATION (74) — SEDUCTION (10) — DUPLICITY —SEVERAL MEANS. An information for seduction is not duplicitous in charging persuasion, promise of marriage and other fraudulent means in accomplishing the seduction; nor is it insufficient in its statement of facts.

SEDUCTION (13)—CRIMINAL RESPONSIBILITY—QUESTION FOR JURY. In a prosecution for seduction, guilt is not disproved by the birth of a well developed child within eight months and one week after the act of intercourse; since it is within medico-legal latitude of the period of gestation.

CRIMINAL LAW (358)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. It is not an abuse of discretion to deny a new trial for newly discovered evidence of another witness to establish an alibi, testified to at the trial by two relatives and another disinterested witness, where, after the state elected as to the date, the accused was given an adjournment to meet the evidence.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered June 2, 1920, upon a trial and conviction of seduction. Affirmed.

[1]Reported in 195 Pac. 229.

John C. Hurspool, for appellant.

Earl W. Benson and *A. J. Gillis,* for respondent.

MITCHELL, J.—Defendant was accused by information of the crime of seduction committed as follows:

"The said William Parker on or about the 15th day of June, 1919, then and there being in the county of Walla Walla aforesaid did willfully, unlawfully and feloniously, by persuasion, promise of marriage and other false and fraudulent means seduce and have sexual intercourse with and debauch Frankie Hoy, an unmarried woman of previous chaste character, etc."

The jury returned a verdict of guilty, and from a judgment and sentence entered thereon the defendant has appealed.

Five assignments of error consist of the court's denying motions, (1) to strike from the information the words "other false and fraudulent means," (2) to make the information more definite and certain by stating what such false and fraudulent means consisted of, (3) to strike the word "persuasion" from the information, (4) to make the information more definite and certain by stating what the persuasion consisted of, and (5) overruling a demurrer that the information charges the commission of the act in several distinct and inconsistent ways.

These five assignments are argued together by the appellant, who contends that, since this court held in the cases of *State v. Carter,* 8 Wash. 272, 36 Pac. 29, and *State v. O'Hare,* 36 Wash. 516, 79 Pac. 39, 104 Am. St. 970, 68 L. R. A. 107, that promise of marriage is not necessary to support a charge of seduction, therefore the information in this case is duplicitous and necessarily charges the crime of seduction by the use of three and possibly more separate means.

Under the statute law of this state and the record in this case, we find it unnecessary to engage in a discussion of the authorities upon which the appellant relies. Section 2137, Rem. Code, provides that, except as otherwise specially provided, the law relating to trials by jury in civil actions shall apply to criminal cases; and § 339, Rem. Code, relating to the manner of conducting jury trials in civil actions, provides that, after the jury has been sworn, "the plaintiff shall briefly state the cause of action and the evidence by which he expects to sustain it." In the present case, the opening statement of the prosecuting attorney to the jury has been preserved in the record. It is exceedingly short, clear and complete. The sole and only means therein stated by which it was claimed the prosecutrix was induced to have unlawful intercourse with the appellant was his promise to marry her, which it was declared he failed and refused to perform. No claim is made that any evidence inconsistent with this single charge was admitted, or attempted to be introduced. An inspection of the entire record supports this view, from which it is apparent no prejudice resulted to appellant on account of the rulings complained of, even if technically erroneous at the time they were made, which, as before stated, we find it unnecessary to decide in this case.

Other grounds of demurrer to the information are that it does not state facts sufficient to constitute an offense, and that two or more separate offenses are improperly joined in the information. They are not insisted upon by any argument and are, we think, without merit.

Also it is claimed the motion for a new trial should have been granted. It is contended that the evidence is insufficient, both generally and specially, to support

the verdict. It is true that there are apparent conflicts and confusion in some of the dates, and there is other testimony an unfortunate adversary might be expected to argue as not being dependable. The story of the prosecutrix and her witnesses does not possess the order and accuracy with which a book would be written, but it does read like a court room history of the downfall of a sixteen-year-old girl procured by the wiles and blandishments of a young man ten years older. In this case there was no motion, either for non-suit or directed verdict, and even if the former law requiring evidence corroborating that of the prosecutrix were still in force, such a motion in this case should necessarily have been promptly denied. The criticisms of appellant are effective only to suggest the province of the jury to sift out the truth, and the evidence is ample to show they have, by their verdict, expressed the fact in this case.

It is claimed by the prosecution that, as a result of the act of intercourse with the appellant on the 13th day of June, the prosecutrix gave birth to a child on the 20th day of February next following. There is testimony to show the child was well developed and required no professional services to protect its welfare. Therefrom it is especially argued by the appellant that he cannot be held responsible as the duration of pregnancy measured by the dates is below the recognized minimum period. There is testimony to show that the child did require and have the care of a physician at the time of its birth and again some days later. But let that be as it may, the term of gestation in this case is clearly within the medico-legal latitude approved by the authorities.

See *State ex rel. Beason v. Law,* 93 Kan. 357, 144 Pac. 232, and *Commissioner of Public Charities etc. v.*

Leary, 129 N. Y. Supp. 148, wherein authorities both medical and legal are collected and cited. Other authorities to the same effect are: *Alfred v. State,* 151 Ala. 125, 44 South. 60; *Qualls v. State,* 92 Ark. 200, 122 S. W. 498; *Peterson v. People,* 74 Ill. App. 178; *Hull v. State,* 93 Ind. 128; 2 Greenleaf, Evidence, § 152; 7 C. J. § 129, p. 995. There was no dispute of the testimony of the prosecutrix that she never had sexual intercourse with anyone other than appellant. The paternity of the child was a question of fact for the jury.

Lastly it is claimed a new trial should have been granted on account of newly discovered evidence of an alibi interposed by appellant. A new witness made affidavit that, on the afternoon of June 13th (the time the state's proof shows the act of sexual intercourse was had), he applied to appellant for work on appellant's farm twenty-five miles away, and that appellant was on his farm all that afternoon. The record shows that, towards the close of the state's case, the prosecution elected to rely upon the 13th day of June, rather than the 15th as alleged in the information, as the date on which the act of sexual intercourse took place, and that, upon the state's resting its case in chief, appellant's attorney, claiming to have prepared the defense with reference to the date of June 15, procured a continuance upon the further statement, ". . . I would like to ask now a continuance until tomorrow to see if I can do it, that is covering the 13th and if not I would like to have a continuance over the term."

On the following morning, without any further application for a continuance, the appellant proceeded with the trial. In support of an alibi he produced two witnesses, father and brother, who testified with cir-

cumstantial detail, refreshing their minds by written instruments of about that date, that appellant was at his farm all day and night on June 13th; and also a wholly disinterested witness who testified positively that he was at the home of the prosecutrix all the afternoon and until dark on June 13th, and that appellant was not there during that time. Under such circumstances, we conclude that the trial judge did not abuse a sound discretion in denying the motion for a new trial. Affirmed.

TOLMAN, MOUNT, MAIN, and HOLCOMB, JJ., concur.

[No. 15996. Department Two. February 2, 1921.]

EARL FERLING, *Respondent*, v. WALKER D. HINES, *Appellant*.[1]

MASTER AND SERVANT (42, 154)—NEGLIGENCE—PLACES FOR WORK—QUESTION FOR JURY. It is for the jury to determine whether it was negligent for an employer to place an 800-lb. roll of belting on edge, unsupported so that it might fall upon a servant, and covered with burlap and a pile of paper cartons, rendering it obscure.

SAME (98, 161)—ASSUMPTION OF RISKS — KNOWLEDGE — QUESTION FOR JURY. In such a case, whether plaintiff knew or should have known of the condition of the belting is for the jury, where he testified that he did not know it was unsupported.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered February 19, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Geo. W. Korte and *Lee & Kimball*, for appellant.

Plummer & Lavin, for respondent.

MOUNT, J.—This action was brought to recover for personal injuries suffered by the plaintiff by reason of

[1]Reported in 195 Pac. 219.

alleged negligence of the defendant. The action was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff. The defendant has appealed.

Appellant argues that the court erred in denying its motion for a directed verdict and also in denying the motion for a judgment notwithstanding the verdict.

The testimony of the respondent is to the effect that on July 11, 1919, he was working for appellant as a checker. His duties were to check freight out of a warehouse conducted by appellant in the city of Spokane. That, after his duties as checker ceased on July 11, 1919, he was directed by the foreman in charge of the warehouse to pile freight and arrange it for delivery the next day. That, as he was going to this work, he saw a box which he thought might be a box he had not been able to find at a previous time. That he stooped down to examine the address on the box, when a roll of belting, four or four and one-half feet high and seven or eight inches wide, weighing eight hundred to one thousand pounds, fell on him from behind and crushed his left foot. This roll of belting was covered with burlap. It had been left standing on edge and a pile of paper cartons was placed on top of it or over it. Respondent also testified that he did not know the belting was not supported; that it was the practice when storing belting of this size to brace it against something or to lay it down flat so that it would not roll over. The evidence with regard to the practice of laying the belting flat or bracing it against some stationary object, was disputed by appellant's witnesses, who testified that it was usually placed on edge.

We are satisfied the question of negligence of the appellant in placing this roll of belting on edge with cartons on top of it or over it, so as to render the dan-

ger obscure or the place unsafe, was a question for the jury. The questions whether the plaintiff knew of the condition of the belting or should have seen it or whether respondent himself caused the belting to fall, as argued by the appellant, are also questions for the jury. It follows that the trial court did not err in refusing to take the case from the jury or to grant the motion for judgment notwithstanding the verdict.

Judgment affirmed.

TOLMAN, MITCHELL, MAIN, and HOLCOMB, JJ., concur.

[No. 16043. Department Two. February 3, 1921.]

A. WORTHY *et al., Respondents,* v. ARCTIC COMPANY, *Appellant.*[1]

WAREHOUSEMEN (7)—INJURY TO GOODS—DETERIORATION OF MEAT—EVIDENCE—ADMISSIBILITY. Upon an issue as to the tainted and unfit condition of meat held in cold storage by defendant, it is admissible to show its unfit condition although still frozen in the center after being transported some distance in express and not refrigerator cars, the weight of such evidence being for the jury.

SAME (7)—SUFFICIENCY. Whether a warehouse properly cared for cold storage meat is a question for the jury, where there was evidence as to its unfit condition when it was examined and tested as it was found in the warehouse.

APPEAL (142)—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS. Error cannot be predicated upon instructions as to the measure of damages where no exceptions were taken.

SAME (437)—REVIEW—HARMLESS ERROR—OBJECTIONS TO ANSWERS. Error cannot be predicated upon not withdrawing affirmative defenses where the matter was provable upon a general denial.

SAME (106) — RIGHT TO ALLEGE ERROR — WAIVER BY STIPULATION. Error cannot be predicated upon not withdrawing from the jury matter which was by stipulation submitted to and decided by the court.

[1]Reported in 195 Pac. 222.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 30, 1920, upon the verdict of a jury rendered in favor of plaintiffs, in an action for damages. Affirmed.

Gram, Hull & Barrett and *Fred B. Morrill*, for appellant.

Luby & Pearson, for respondents.

MITCHELL, J.—This is an action to recover damages alleged to have been caused by the negligence of the defendant, the Arctic Company, a corporation, in allowing meat placed in its custody for cold storage to thaw out, become soiled, contaminated, infected and subjected to ammonia fumes, so as to spoil it and render it unmarketable. A trial resulted in a verdict and judgment for the plaintiffs, from which the defendant has appealed.

Respondents were engaged in the wholesale and retail meat business at Ione, one hundred and seventeen miles from Spokane, at which latter place was located the cold storage warehouse of the appellant. An agreement was entered into by which, in the month of November, 1918, the respondents delivered in good condition 31,764 pounds of fresh beef to the appellant to be frozen and kept so, for an agreed compensation. Thereafter respondents ordered and received shipments of the meat from time to time as needed from January 20, 1919, until May 20, 1919, when, as they claim, the meat had become so spoiled and unmarketable they declined to receive any more of it. There remained on hand with the appellant 5,644 pounds, as originally weighed, that was wholly unmarketable and lost to respondents, as they claim, to their damage in the sum of one thousand dollars.

The proof shows that cold storage meat may be kept in good condition for a period of one to two years.

In the months of April and May, 1919, respondents' retail customers made serious objections to the meat, and some of them quit buying several weeks prior to May 20, 1919. A number of witnesses testified that the meat had a strong smell, foreign to ordinary cold storage meat. It was testified to that the room in which it was stored had an odor different from that in other cold storage rooms of the same warehouse. A witness of seven years' experience in the fresh meat business took six samples of this meat from the appellant's storage room and cooked it. He found the fat had a very bad taste; not desirable to eat; it had a strong, oily taste, similar to bear meat. He further stated the only reason he could give for its condition was variation of temperature, allowed to thaw a little bit and then freeze up again; and that several times when in the room in which the meat was stored he did not think the room was cold enough. He further stated that the room was not clean.

Another witness of twenty years' experience in the meat business, who had been a butcher for eleven years and who had handled frozen beef, examined this at the warehouse and found it in poor condition. He cut off a piece and tested it. It seemed like ammonia had gotten into it, that was the odor it had. It was rancid. He did not consider the room in a very sanitary condition. The floor was not clean. He further testified he had handled meat affected with ammonia and this seemed to be that way. Other witnesses who examined it about May, 1919, testified similarly, some of whom noticed the smell of ammonia in the storage room or another room separated by an open doorway. Another customer of the appellant who had put thirty-five head of slaughtered beef in storage in the same room in October, 1918, found its meat in about the same condition from the 1st of May, 1919, as that of

the respondents. All of the fat had to be cut away as spoiled. It had a taint, a foreign flavor.

The evidence shows that respondents would order meat which would be sent out by express the next morning, getting to Ione about noon. It was wrapped in burlap for the purpose of shipment. Upon receiving it at Ione, it was kept in an ice box prepared for that purpose wherein the meat was allowed to thaw gradually. The proof shows that to be the proper way to handle cold storage meat and that, if so handled, it will keep satisfactorily for a week or ten days.

Respondents' proof shows that, while selling the meat at Ione, they handled none other, and that they disposed of each shipment within a few days after receiving it. A number of their retail customers at Ione who made purchases of the meat in April and May, 1919, testified, over the objections of appellant, that the meat was tainted, smelled bad, and that it was not fit to eat. That they could not eat it after it was cooked, and that the meat, as they purchased it, was still frozen in the center. This testimony was claimed to be immaterial for the reasons that the appellant was to make delivery at Spokane rather than at Ione, and because the meat was transported, at the instance of respondents, by express and not refrigerator cars. But we are satisfied that, under the circumstances delineated and explained by the evidence, and considering the condition of the meat as to its temperature at the time it was received by the witnesses, the testimony was properly admitted—its weight being for the jury.

After respondents had rested their case, counsel for appellant moved for a directed verdict, which it is claimed should not have been denied. This assignment is presented from two angles; (a) that the testimony is insufficient to show the meat had become dam-

aged by reason of the negligence of the appellant; and (b) that there was no proper evidence showing the amount of damages so that the jury could reasonably assess the same.

As to the first, reliance is had upon that portion of the case of *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721, which discusses the law of a *prima facie* case of negligence where merchandise is delivered to a bailee for hire, in good condition, and a re-delivery is not made, or upon the re-delivery the goods are found to be damaged, according to whether the property is perishable or not; and in connection with it the assertion made by the court that it is within the common understanding of all men that meat will spoil and become damaged through internal defects or the operation of natural causes. But that case is no precedent for determining this one wherein there is evidence of examining and testing the condition of the article as it was found in the warehouse, from which the jury were at liberty to say there was deterioration and that it proceeded from abnormal causes rather than internal defects or the operation of natural influences.

As to the second feature of this assignment, the contention is that May, 1919, when respondents declined to take any further delivery of the meat, was an improper date to be considered in ascertaining and fixing the amount of damages respondents were entitled to recover; as well also the amount of damages actually found by the jury. The trial court's instruction upon this feature was clear and explicit. No exception was taken to the instruction and appellant is therefore precluded by the rule and measure thereby established. *Sexsmith v. Brown*, 61 Wash. 164, 112 Pac. 337; *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90, 147 Pac. 652; *Peters v. Union Gap Irr. Dist.*, 98 Wash.

412, 167 Pac. 1085. The amount awarded by the jury ($507.96) is well covered by the proof.

Another assignment of error is that the court should not have withdrawn from the consideration of the jury affirmative defenses contained in the answer. A consideration of the affirmative matter shows that, with one exception, the facts alleged were provable under a general denial. The exception related to the proceeds of a sale of the meat, made upon an order of court procured by the appellant, less its warehouse charges and reasonable expenses in making the sale, all of which occurred after the commencement of this action. This portion of the controversy, however, by stipulation entered into by the parties while the jury trial was going on, was taken from the consideration of the jury and subsequently decided by the court.

Nor did the court err in denying appellant's motion for a judgment notwithstanding the verdict. Without going into details, it may be stated there was strong, substantial testimony that appellant was free from negligence in its treatment and care of the meat. Thus it is manifest that there was substantial evidence on both sides of the question, and therefore the determination of it was for the jury.

Assignments of error in denying the motion for a new trial and in entering judgment upon the verdict are supported by no distinctive argument of the appellant, and require no further consideration here.

Judgment affirmed.

MAIN, MOUNT, HOLCOMB, and TOLMAN, JJ., concur.

[No. 16109. Department Two. February 3, 1921.]

GRACE L. SMITH, *Executrix, Respondent*, v. INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—QUESTION FOR JURY. Whether a train crew sounded warnings at a railroad crossing is a question for the jury, where two witnesses testified that they were in a position to hear and would have heard a whistle or bell when the train passed if sounded, and heard none, although employees on the train testified that the bell was rung and whistles blown.

SAME (64-66) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. Whether deceased, driving a motor truck, and struck at a crossing by an electric train, was guilty of contributory negligence is a question for the jury, where the train approached without warning in a cut, on a down grade, the train men first saw the truck forty feet away when its front wheels were upon the track, and no one saw what the deceased did before he attempted to cross.

Appeals from a judgment of the superior court for Spokane county, Blake, J., entered March 29, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Graves, Kizer & Graves, for appellant.

Danson, Williams & Danson (R. E. Lowe, of counsel), for respondent.

MOUNT, J.—On October 14, 1919, W. F. Smith, while driving along a highway at the crossing of the defendant's railway, was struck by one of the defendant's trains and killed. His widow, as administratrix of his estate, brought this action to recover damages on account of his death. The complaint alleged negligence of the defendant in several particulars. These allegations of negligence were all denied by the defendant, and an affirmative defense was pleaded to the effect that the death of Mr. Smith was caused by his

[1]Reported in 195 Pac. 236.

own negligence. Upon these issues, the case was tried to the court and a jury and resulted in a verdict and judgment in favor of the plaintiff. The defendant has appealed from that judgment, making two assignments of error to the effect that the court erred, first, in denying the appellant's motion for a directed verdict at the close of the plaintiff's evidence and again at the close of all the evidence; and second, in denying the appellant's motion for judgment notwithstanding the verdict.

In substance, the facts are as follows: The appellant operates an electric interurban railway in and out of the city of Spokane. On the east border line of the city, the railway is crossed by a county highway. At the point of crossing and for some distance on either side, the railway extends through a cut estimated at from seven to eight feet deep. The county road crossing the railroad at nearly right angles also approaches the railroad for some distance in a cut estimated at from four to seven feet in depth. At this cut, the railway company maintains an automatic bell which is intended to ring at the approach of trains from either direction.

In the afternoon of October 14, 1919, Mr. Smith started from his farm, which is east of the city of Spokane, with a load of thirty boxes of apples upon a Ford automobile truck. Some three hundred feet to the south of the crossing, there is an eight per cent grade from that point to a point beyond the railroad crossing. Mr. Smith was going down this grade with his load of apples. He was traveling to the north. The railway train about the same time was traveling toward the west. This train for several miles was running on a down grade of two per cent, with the power shut off and the brakes lightly applied, so the train was coasting down grade. Apparently Mr. Smith and

the electric train reached the crossing at the same time and Mr. Smith was killed.

It is contended by the appellant that there was no sufficient evidence of negligence on the part of the railway company. At the trial of the case, the court submitted to the jury three elements of alleged negligence: (1) Whether or not the train was running at an excessive rate of speed; (2) whether the view of the train was obstructed by a growth of vines and weeds upon the right of way of the railway company; and (3) whether the railway company neglected to sound the whistle or ring the bell upon the railway train before approaching the crossing. Appellant strenuously argues that there was no sufficient evidence to go to the jury upon either of these questions of negligence.

We may dismiss, without further consideration, the question whether there was sufficient evidence to go to the jury upon the speed of the train, or upon whether there was grass or vines growing upon the right of way of the railway company which precluded the view of the train; but we are satisfied there was sufficient evidence to go to the jury upon the question of whether or not the appellant's train crew operating the train sounded the whistle and rang the bell on the train previous to approaching the highway crossing.

At least two witnesses testified in behalf of the respondent to the effect that they were in a position to hear the whistle, if blown, and to hear the bell on the train as it passed, if the bell had rung, and that they heard no bell and heard no whistle. The employees of the railway company upon the train testified, in substance, that they set the bell in motion upon the train and that it was ringing continuously from the top of the grade before reaching the crossing and that the regular crossing whistles were blown before approaching the crossing. It is strenuously argued by the ap-

pellant that the evidence of the respondent upon this question was negative in character and should not be considered against the positive evidence of the employees of the railway company. There is authority to support their contention, but this court, in *McKinney v. Port Townsend & P. S. R. Co.*, 91 Wash. 387, 158 Pac. 107, on a disputed question of fact of this same character, said:

"While the fireman and engineer and one passenger on the train testified that the bell was rung until the emergency brakes were applied about one hundred feet from the crossing, other witnesses who heard the whistle when the train was a quarter of a mile further away, and one of whom actually saw the collision, testified that they did not hear the bell at all. All of the occupants of the automobile said that they did not hear either the bell or the whistle. It is true that the evidence that the bell was not sounded was negative in form, but it was as positive in character as the nature of such a case will usually permit. It was sufficient to take the question to the jury."

A number of cases to that effect are there cited.

And in *Kent v. Walla Walla V. R. Co.*, 108 Wash. 251, 183 Pac. 87, upon the same question, this court said, in a case where the question was whether negative evidence was overcome by positive evidence:

"Even though the positive testimony that the signals were given may seem the more credible, we cannot say that the evidence that the signal was not given is overcome. The question of negligence was properly submitted to the jury."

Notwithstanding what other courts may have said upon this question, the rule in this state is that, where witnesses are so situated that they could hear and would have heard, if the crossing signals had been given, where this testimony is disputed by positive evidence to the effect that the crossing signals were

given, makes a question of fact for the jury. We are of the opinion, therefore, that, upon this question alone, the case was properly submitted to the jury and the finding of the jury must be conclusive upon that question.

Appellant next argues, and with much reason, that the whole evidence, taken together, shows conclusively that Mr. Smith, at the time he undertook to cross in front of the train, was guilty of contributory negligence and for that reason there could be no recovery. There is no evidence in the case to show what Mr. Smith did when he approached the crossing. As we have shown above, the railway train was an electric train. It was approaching the crossing in a cut seven or eight feet deep on a down grade of two per cent. Mr. Smith, in his automobile, which had been changed from a touring car to a truck without any top, was approaching the crossing on a down grade of eight per cent, also in a cut from four to seven feet deep. According to the photographs in evidence, there were high rocks at points between him and the approaching train. At best, he could have seen at certain places the tops of the cars as they were approaching. His automobile, no doubt, was making some noise. The train as it rolled down the grade was, no doubt, also making some noise, but there was no smoke or anything of that kind to attract the attention of a traveler on the highway. The automatic crossing bell may or may not have been ringing. The witnesses who testified that they heard no bell upon the approaching train and no whistle, also testified that they did not hear the automatic bell at the crossing; that they were but a short distance, two or three hundred feet, away, and that the automatic bell when ringing could be readily heard at that distance. When the railway train was within thirty or forty feet of the highway crossing, the

motorman on the train in front saw the automobile come upon the track just ahead of the train. The automobile was not seen until the front wheels were upon the railway track.

Upon the question of contributory negligence, this court said in *Norman v. Bellingham,* 46 Wash. 205, 89 Pac. 559:

"The appellant, however, makes the point that the evidence failed to show affirmatively that the respondent was free from contributory negligence, and cites a number of cases from other jurisdictions holding that the burden is upon the person injured to show that his want of care did not contribute to his injury. Undoubtedly the rule contended for prevails in the jurisdictions from which the cases cited were obtained, but the rule is not general and was early repudiated by this court. In this state the burden is upon the party affirming it to establish contributory negligence, and where the evidence is silent as to the question, due care is presumed."

A number of cases are there cited to support the rule.

Since no one saw the deceased at the time he approached the crossing, and since there was no evidence to show what he did at or before he attempted to cross the railway track, it must be presumed that he used due care. If his engine was running, making a noise, as it no doubt was, and if he approached the crossing and stopped, looked and listened before attempting to make the crossing and did not hear the crossing bell or the approach of the train and did not see it until it was too late to avoid the accident, he was clearly not guilty of contributory negligence. *Kent v. Walla Walla V. R. Co., supra; Golay v. Northern Pac. R. Co.,* 105 Wash. 132, 177 Pac. 804, 181 Pac. 700; *Brandt v. Northern Pac. R. Co.,* 105 Wash. 138, 177 Pac. 806, 181 Pac. 682.

But it is said by the appellant that, if Mr. Smith had looked at certain places within one hundred and seventy-five feet or less from the crossing, he must have seen the train. It is no doubt possible that if he had looked at certain places he might have seen the train. The train, as we have said, was coasting down a two per cent grade in a cut. Mr. Smith was approaching the crossing also in a cut. At best, he could have seen but a small portion of the tops of the cars. If he had stopped at certain points before attempting to make the crossing, the railway train may have been some distance away. He may not have seen it though he had looked carefully. He may have stopped his automobile, loaded as it was, at a point where the train would have been obscured by the rocks and bushes outside of the right of way.

Among other cases, appellant relies upon the case of *Benedict v. Hines,* 110 Wash. 338, 188 Pac. 512.

We are of the opinion that case is readily distinguishable from this by reason of the fact that there, while Mr. Benedict was crossing the track, witnesses who saw him testified that, as he approached the crossing, he was driving at a speed of eight or ten miles per hour; that he never slackened his speed but kept right on, and after crossing through the line of box cars, drove immediately in front of the train without looking or taking any precaution for his safety. There was, therefore, no presumption in that case that he exercised due care, because the evidence there very clearly showed that he exercised no care whatever. In this case, there was no evidence at all tending to show that Mr. Smith did not use due care. At any rate, we are satisfied, that under all the circumstances of the case, there was sufficient evidence to go to the jury upon the question of the contributory negligence of Mr. Smith.

We are of the opinion, therefore, that the trial court did not err in denying the motions for a directed verdict and the motion for judgment *non obstante*.

The judgment must therefore be affirmed.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[Nos. 16146, 16144, 16145. Department Two. February 3, 1921.]

L. S. DART *et al.*, *Appellants*, v. D. K. McDONALD *et al.*, *Respondents*.

MAUDE S. McDONALD, *Respondent*, v. L. S. DART *et al.*, *Appellants*.

L. S. DART *et al.*, *Appellants*, v. D. K. McDONALD *et al.*, *Respondents*.[1]

HUSBAND AND WIFE (18, 20)—SEPARATE ESTATE—CONVEYANCES TO WIFE—PROCEEDS OF SEPARATE PROPERTY. Land conveyed by husband to wife is, as between them, her separate property, where they had purchased it with other property subject to mortgage, she agreed to pay a specified part of the mortgage, used her portion as her separate property and mortgaged it, using the proceeds to pay her assumed part of the prior mortgage.

SAME (58) — COMMUNITY PROPERTY — EVIDENCE AS TO CHARACTER. The husband's joining in a deed of the wife's separate property does not show that it was community property.

EXECUTION — SALE — EFFECT OF REVERSAL OF JUDGMENT. After reversal of a judgment under which there had been an execution sale of a house, the owner cannot recover, as rents and profits, the real estate agent's reasonable commission for collecting the rent.

COSTS (61)—ON APPEAL—SUCCESSFUL PARTY. A wife, appearing separately to defend her separate estate, is entitled to costs upon obtaining a reversal on her separate appeal prosecuted by her separate funds; and such costs cannot be offset against costs allowed in the original action.

Appeals by both parties from judgments of the superior court for Spokane county, Blake, J., entered

[1]Reported in 195 Pac. 253.

June 7, 1920, in related actions quieting title, granting restitution and decreeing an account, after a trial to the court on the merits. Affirmed.

F. W. Girard and *Fred W. Williams*, for appellants.

Edwin C. Mathias and *Graves, Kizer & Graves*, for respondents.

MOUNT, J.—These three cases are closely related. They were tried separately in the court below, but, by stipulation of the parties, are consolidated for argument here and are presented in one set of briefs. They all arise out of facts which may be briefly summarized as follows:

On June 24, 1918, L. S. Dart and others obtained a judgment against D. K. McDonald, Maude S. McDonald, his wife, and others. Mrs. McDonald appeared separately in that case and appealed from a judgment therein rendered against her. The judgment against her in her individual capacity was reversed. See *Dart v. McDonald*, 107 Wash. 537, 182 Pac. 628. Pending the appeal in that case, an execution was issued and levied upon two pieces of property which then stood in the name of Mrs. McDonald. One is known in the record as an orchard tract in Opportunity, in Spokane county, and the other is an apartment house known as Princeton apartments, in the city of Spokane. These properties were sold by the sheriff under the execution and bid in by Mr. Dart. Sheriff's deeds were issued and confirmed and Dart went into possession of the property.

After the judgment had been reversed upon appeal, Mrs. McDonald brought two actions; one, an action against the Darts to quiet title in her because of the sheriff's deed standing of record. This action resulted in a judgment quieting title in Mrs. McDonald.

The Darts have appealed from this judgment. About the same time, Mrs. McDonald sued out a writ of restitution which came on to be heard and resulted in a judgment placing her in possession of the property and an accounting for rents, issues and profits in favor of Mrs. McDonald for $1,709.61. Mrs. McDonald has appealed from the order determining the rents, issues and profits, claiming that the court erred in not allowing her $294.02 paid by the Darts to an agent as commission for renting the apartments.

After judgments in all these cases, the Darts, by a proceeding in the lower court, attempted to offset the costs, amounting to some six hundred dollars in their favor in the original action, against a judgment for a like amount in favor of Mrs. McDonald upon her appeal in that action. The trial court denied the right to offset. The Darts have appealed from that order.

We shall consider these cases in the order in which they are above stated. The facts relating to the action to quiet title are substantially as follows: In the year 1911, Mr. and Mrs. McDonald, who were then husband and wife and had been such for a number of years, owned, jointly with one A. B. Clark and wife, a tract of land in Grant county comprising sixteen hundred and twenty acres. A mortgage upon this land had been executed by the owners for thirty-five thousand dollars in favor of the DeTweed Northwestern & Pacific Hypotheek Bank. In the same year (1911), Mr. and Mrs. McDonald and Mr. Clark agreed upon a partition of that tract of land. Three hundred and twenty acres of the tract was deeded to Mrs. McDonald as her separate property. She assumed and agreed to pay ten thousand dollars of the mortgage then existing upon the whole tract. D. K. McDonald in his separate right was given eight hun-

dred acres and he assumed and agreed to pay fifteen thousand dollars of the mortgage then upon the whole tract. A. B. Clark and wife were given five hundred acres and assumed and agreed to pay ten thousand dollars of the mortgage then upon the whole tract. Immediately after this division of the property among the parties, Mrs. McDonald took actual possession of the three hundred and twenty acres deeded to her as her separate property and operated it thereafter as her own separate property without the intervention of her husband. Mr. McDonald at that time, according to the undisputed testimony, was worth, over and above his unsecured debts, two hundred thousand dollars or more. This transaction took place two years or more before the transaction arose upon which the judgment of Dart *et al.* against McDonald *et al.*, reported in *Dart v. McDonald, supra,* was instituted, and apparently before McDonald had thought of the business which gave rise to that action.

In the year 1916, Mrs. McDonald borrowed from the Vermont Loan & Trust Company ten thousand five hundred dollars and secured the same by a mortgage upon her separate property. Mr. McDonald at the same time borrowed twenty thousand dollars from the Vermont Loan & Trust Company and secured the same by a mortgage upon the eight hundred acres of his property. Twenty-five thousand dollars of this money was used to satisfy the mortgage held by the DeTweed Northwestern & Pacific Hypotheek Bank. The mortgage of that company was then released upon the property of Mrs. McDonald and D. K. McDonald. Afterwards, Mrs. McDonald exchanged her three hundred and twenty acres of land subject to the mortgage of ten thousand five hundred dollars to one L. Williams for the apartment house in Spokane. Mr. Williams accepted the three hundred and twenty

acres of land subject to the ten thousand five hundred dollar mortgage. Mrs. McDonald took the apartment house subject to a mortgage of fifteen thousand dollars, which she assumed and agreed to pay. After Mrs. McDonald had taken possession of the apartment house which she had obtained for her farm land, Mr. McDonald executed a quitclaim deed reciting that the property was the separate property of Mrs. McDonald. Mrs. McDonald, from the time she received the farm land in 1911, up until she was dispossessed of the apartment house under the sheriff's sale, had operated both the farm while she owned it and the apartment house as her separate and individual property.

We have carefully read the whole of the evidence upon the trial and it conclusively shows that this property is the separate property of Mrs. McDonald. In fact, there was no evidence offered to the contrary. The appellants here seek to charge the property as community property, claiming that the original judgment in *Dart v. McDonald*, 107 Wash. 537, 182 Pac. 628, is a community judgment and that this property is liable for the payment of that judgment. Their contention is based, if we understand their argument correctly, upon the theory that, when this tract of sixteen hundred and twenty acres in Grant county was purchased, it was purchased as community property, and the mortgage of thirty-five thousand dollars upon the property was a community obligation and that it continued a community obligation until it was finally paid. As between the mortgagors and the mortgagees, this no doubt was a community obligation and continued as such until it was paid; but, as between Mr. and Mrs. McDonald and all the world beside who were not creditors at that time, where no fraud was shown in the transaction (as none was shown here), the three hun-

dred and twenty acres deeded to her by her husband was separate property. It stood of record in her name as separate property. She used it and operated it as separate property in all her dealings with it. When she assumed the debt of ten thousand dollars, she assumed it in her separate right and all her separate property thereby became liable for that debt. That ten thousand dollars was afterward paid by Mr. Williams, who purchased the property from Mrs. McDonald. The property she acquired in its stead became her separate property beyond any question.

It seems to be argued by appellant that the proceeds of the ten thousand five hundred dollar mortgage which Mrs. McDonald placed on the mortgaged property was used to discharge a community obligation and therefore the property itself became community property. But, as we have seen above, this ten thousand five hundred dollars was borrowed by Mrs. McDonald, not for the purpose of putting it into the property itself, but was borrowed for the purpose of paying her separate obligation, namely, ten thousand dollars which she had assumed and agreed to pay. It is true the ten thousand dollars which she first assumed and agreed to pay, when the property was first deeded to her, was the community obligation; but when she acquired the property as her separate property, she, as a separate entity, assumed and agreed to pay that portion of the community debt as a part consideration for the deed from her husband to herself. This clearly made it a separate obligation of her own and the proceeds of the mortgage were not devoted to a community use, but were solely for the purpose of her individual use. In the case of *Graves v. Columbia Underwriters,* 93 Wash. 196, 160 Pac. 436, we said, at p. 199:

"We have held in the case of *Dobbins v. Dexter Horton & Co.,* 62 Wash. 423, 113 Pac. 1088, that the joinder

by a husband with his wife in a note and mortgage upon her separate property would not make the property nor the proceeds therefrom community property. While the presumption naturally arises that property acquired during the marital relation is community property, the presumption is a rebuttable one. *Weymouth v. Sawtelle,* 14 Wash. 32, 44 Pac. 109. In the present case, the facts indisputably show that the borrowed money was in no way devoted to a community use, but solely for the benefit of the separate property on which it was raised. The status of Mrs. Fife's separate property, having been fixed as such at the time of its acquisition, would remain so fixed unless changed by deed, due process of law, or by the working of some form of estoppel. *Katterhagen v. Meister,* 75 Wash. 112, 134 Pac. 673; *In re Deschamps' Estate,* 77 Wash. 514, 137 Pac. 1009; *Morse v. Johnson,* 88 Wash. 57, 152 Pac. 677."

See, also, *In re Finn's Estate,* 106 Wash. 137, 179 Pac. 103.

Appellant also seems to argue that the fact that Mr. McDonald joined in the mortgage made the property community property. In the case of *Chapman v. Edwards,* 113 Wash. 224, 193 Pac. 712, this court said:

"It seems well settled by our decisions that the property, becoming the separate property of Mrs. Chapman by the giving of the conveyance made May 17, 1917, did not change its character as her separate property by the mere joining of her husband with her in the execution of these subsequent mortgages."

Volz v. Zang, 113 Wash. 378, 194 Pac. 409, announces no definite rule than that above stated.

We are satisfied, upon the whole record, that the trial court properly found that the apartment house was and is the separate property of Mrs. McDonald. The appellants apparently make no contention that the orchard tract was not the separate property of Mrs. McDonald, and we are clearly of the opinion that

both tracts are her separate property, and that the execution sale was a cloud upon her title and the court properly quieted the title to both tracts in Mrs. McDonald.

It follows that judgment must be affirmed.

Upon the accounting for the rents, issues and profits, the trial court was evidently of the opinion that the $294.02 paid by Darts to a real estate agent as commissions for collecting rents of the apartment was properly paid by the Darts. The record shows that Mrs. McDonald, when she was conducting the property in her own name, employed agents for the purpose of collecting the rents and paid a commission therefor. We are of the opinion that the commission was a reasonable commission and was a part of the necessary expenses for conducting the apartment house, and that the court properly refused to allow this sum to Mrs. McDonald.

The judgment upon that appeal must also be affirmed.

It is argued, upon the appeal from the order refusing to set off six hundred dollars costs in these proceedings against a like amount in the original proceeding, was error because the original appeal in *Dart v. McDonald* was financed by the community. The record here very plainly shows that Mrs. McDonald herself appeared in the original case independently of her husband and the other defendants, prosecuted the appeal in her own behalf by her own separate funds and obtained a reversal. She was clearly entitled to her costs in that case. These costs were not community costs, but were her own separate costs. The trial court therefore correctly refused to offset the costs in the original action against the judgment of Mrs. McDonald in this proceeding.

The judgment upon that appeal is also affirmed. The respondent, Mrs. McDonald, will recover her costs herein.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 16127. Department Two. February 3, 1921.]

C. P. THOMAS *et al., Respondents,* v. CITIZENS' REALTY COMPANY, *Appellant.*[1]

LANDLORD AND TENANT (114, 115) — RENT — ACTIONS — VALUE OF GROUND RENT—EVIDENCE. In an action to recover ground rent, based upon five per cent of value appraisements to be made every five years, similar transactions in the vicinity are properly considered but are not conclusive criterions of value, especially where the relations of the parties made it not unreasonable to allow the sellers something over the actual value; nor is a prospectus of the "Somers System of Valuation" to be considered when it was not put in evidence.

SAME. In such a case, a valuation of $119,115.18 is shown, where the preponderance of the evidence was that the corner influence amounted to fifty per cent, instead of one-third as found by the court, and computed on that basis the above sum would be reached.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered December 9, 1919, upon findings in favor of the plaintiff, in an action to determine ground rent, tried to the court. Modified.

Post, Russell & Higgins, for appellant.

Danson, Williams & Danson (*R. E. Lowe,* of counsel), for respondents.

TOLMAN, J.—Appellant is the owner of a tract of real estate located at the southeast corner of Post street and Main avenue, in the city of Spokane, upon which there is a ground lease running for a long term,

[1]Reported in 195 Pac. 209.

now held by respondent as assignees of the original lessees, which provides that the lessees shall pay as ground rent five per cent of the value of the land exclusive of improvements, such value to be found by appraisement at five-year periods and the rent to be paid accordingly for the period of five years following the time fixed for such appraisement. According to the terms of the lease, the value of the land was to have been determined by appraisement in December, 1918, for the purpose of fixing the amount of the rental for the five-year period next ensuing, and at that time each of the parties appointed an appraiser, but these two appraisers were unable to agree upon the value of the ground, and were unable also to agree upon a third appraiser as provided for in the lease, and because of such failure this action was brought to determine the value for the ensuing five-year period. The cause was tried to the court without a jury, and the court found such value to be $101,085. The owner of the land, who was the defendant below, has prosecuted this appeal from that judgment.

Numerous errors are assigned which we do not find necessary to consider in detail, because there is only one question involved, and that a question of fact only, which is, What was "the reasonable and fair and actual value of said premises," such being the language of the lease? The trial court, in what appears to have been a carefully considered memorandum opinion, said:

"For the purpose of aiding the court in fixing the values of the property in question, each party has offered the testimony of experts. The opinions of these experts are so hopelessly in conflict as to the value and the range of estimates so far apart that they afford but little assistance to the court in determining values; however, there are a few facts upon which there is little dispute, which are of material benefit in estimating

the value of the property. There is little dispute as to the value of a foot by 150 feet on an inside lot fronting Main avenue, being $1,500. There is practically no dispute that the Somers system, a standard for land valuation, is used by experts in determining the value of property of this character. I have availed myself of this system so far as I am able to understand that it is of service. The standard of value by this system is 1 foot by a 100, and that one foot by 150 feet is 115% of that standard; this fixes the value of 1 foot by a 100 on an inside lot on Main avenue at $1,304.34. The property under consideration is practically 118 feet, and under this system there must be added 6.81% for the additional 18 feet, which, when computed makes 1 foot by 118 on an inside lot $1,393.16, or $79,410.12 for the whole 57 feet, to which the value of what is known as the corner influence should be added. There appears to be no definite and fixed rule for this influence, but from the testimony of the experts there is little conflict as to its ranging from 25% to 50%, and under all the evidence in this case I estimate this influence to equal one-third the value of 50 by 100 feet at the corner, or one-third of $65,217, which is $21,735. When these various sums are added together, they amount to $101,149.12, from which I deduct the value of 1-13/16 of an inch on Post street front, being the amount the lot is short of 118 feet on that street, making the net value of this lot $101,085, which sum I find to be the reasonable value of the lot for the five-year period of the lease from January 1, 1919, to January 1, 1924."

After a careful study of what appears to be a thoroughly prepared and comprehensive abstract of the testimony, we can appreciate what was said by the trial court as to the hopeless conflict of the testimony and the apparent impossibility of harmonizing this testimony so as to draw therefrom a satisfactory result, and in the nature of things this is more difficult for us than for the trial court who saw and heard the witnesses. We are asked, since this is a trial *de novo,* to disregard the findings of the trial court entirely and

arrive at a conclusion from the evidence in the case without reference thereto. This argument is based chiefly upon the fact that the witnesses for appellant generally based their opinions of the value of this property largely upon two transactions: a lease to the Palace Department Store of property directly across the street to the north, and a sale to the Crescent Department Store of property lying a few feet to the east.

These transactions are proper to be considered in a general way, but are not conclusive criterions and cannot be followed absolutely to the exclusion of the testimony regarding sales of other property in the general vicinity; because, with reference to the lease to the Palace Department Store, it appears that the tenant there affected was to pay as rental a certain percentage upon the actual cost of the building erected on the premises (which actual cost was carried as the value of the building throughout the term without re-appraisement), plus a percentage upon a reasonable or fair market value of the land as found by appraisement for each five-year period. It also appears that the value of the land, as fixed for the corresponding period in the Palace Department Store lease, was determined by agreement of the parties and not by appraisement; and since this agreement may have been reached by reason of some necessity upon the part of the tenant, or because of the cost of the building being less than its actual value at the time of re-appraising the land, the values thus arrived at are by no means conclusive. As to the sale of the property to the Crescent Department Store, the price at which that sale was made is not an absolute criterion, because the Spokane Dry Goods Company, the owner of the Crescent Store, was already the owner of the property to the east of that which it purchased, it desired to extend its space largely and erect a large, modern, well

equipped department store building several stories in height, and could therefore only consider property immediately adjoining that which it then owned. And Mr. Payne, an officer of that company, testified as follows:

"Q. Did it strike you as being an excessive price? A. It did not at the time, I didn't question the price. Q. Do you do it now? A. Since that time, yes. Q. It is sort of family matter, wasn't it? A. I wouldn't say it was, it was an out and out purchase of the property, although these men were members of our firm and dealing on both sides of the question. Q. They were stockholders? A. Yes and they made the price and it was accepted by the company. Q. And isn't it true Mr. Payne that another thing that entered into that was the fact that they were compelled to have that in order to carry out the building as you had planned it? A. We wanted it, yes."

While all of these gentlemen engaged in this transaction were men of honor, with the highest reputation for fair dealing, yet it is not unnatural for the owner to value his property somewhat in excess of its market value, and in a transaction such as Mr. Payne's testimony shows this to have been, it is not unreasonable to suppose that the parties, understanding the situation fully, might be willing to allow the sellers something more than the actual value, or, in other words, might consider its prospective value in connection with their contemplated improvements. Nor would one or two isolated transactions necessarily form an absolute criterion in any event.

There is some evidence as to the net income received by the lessee, which might indicate a value less than that given by any witness, but this evidence is very incomplete and unconclusive, there being no attempt to show that the percentage named was figured on the actual value of the improvements, that the property

was economically handled, or even what the gross income was and what items were charged against the gross as operating expenses. Clearly this cannot be seriously considered, and if it could, we should then have to weigh against it the question of whether or not the property is underimproved, upon which there is some slight evidence *pro* and *con* in the record. So that we are forced to the conclusion that nowhere in the testimony can we find any absolute criterion for fixing the value of the property under consideration, and the best and fairest basis of value is that adopted by the trial court in his memorandum decision, which we have quoted.

Nor can we follow appellant in his attempt to apply to the testimony in this case what is known as the Somers System of Valuation, because nothing of the sort is in evidence here, except as the various witnesses have referred to their use of the Somers System in arriving at their opinions. We have been furnished a pamphlet entitled "Prospectus of New York Somers System Service, a Standard for Land Valuation," but since it was not offered in evidence we do not care to undertake to use such publication as a basis for arriving at our conclusion here.

We do find, however, one thing apparently overlooked by the trial court, and that is that almost all of the witnesses in the case upon both sides agree in their opinion that the corner influence on this particular property amounted to fifty per cent, and most of them seem to be of the opinion that the corner influence affected the whole fifty-seven feet frontage on Main avenue, though one witness for respondent did limit that influence to fifty feet. We think the evidence preponderates against the opinion of the trial court that this influence was equal to only one-third, and was limited to fifty feet of the Main avenue frontage, and

that by a decided preponderance of the evidence the corner influence is established at fifty per cent and covers the whole fifty-seven feet.

Taking, then, the trial court's valuation of one foot by one hundred eighteen feet at $1,393.16 as inside property, adding to it fifty per cent for the corner influence gives $2,089.74 as the value of each one of the fifty-seven feet of Main avenue frontage, back for a distance of one hundred eighteen feet; multiplying this sum by fifty-seven gives $119,115.18, which should have been the value reached by the trial court. We are more convinced of the correctness of this result because of the fact shown by the record that, at the preceding appraisement five years before, the value of the property was fixed by the appraisers and accepted by both parties as being $117,833, for the five-year period ending December 31, 1919, and the testimony in the case of the witnesses who testified upon that subject was largely to the effect that values had not materially changed during such period. We do not mean to say that the preceding appraisement is evidence of the present value, but the fact that it was accepted and acted upon by both parties for a period of five years without protest, coupled with the testimony that there had been little or no change in values, which has been referred to, is as persuasive as almost any other evidence in the case. We are of the opinion that the judgment of the trial court must be modified as stated. It is so ordered.

HOLCOMB, MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15917. Department One. February 7, 1921.]

E. M. WHITESIDE, *Respondent*, v. BENTON COUNTY, *Appellant*.[1]

COUNTIES (57, 58) — LIABILITIES — TORTS—GOVERNMENTAL FUNCTIONS—PUBLIC IMPROVEMENTS. A county is not strictly a municipal corporation or within the rule of nonliability for damages brought about in the performance of governmental functions; and hence is liable in tort for flooding land in doing road work.

WATERS AND WATER COURSES (56)—SURFACE WATERS—DRAINAGE OR DISCHARGE—LIABILITY. A county is liable for damages caused by flooding land where, in order to protect a road from surface waters, it dug an artificial ditch conveying and depositing waters on land that naturally would not receive them.

DAMAGES (57)—INJURY TO REAL PROPERTY—DAMAGES FROM OVERFLOW. The measure of damages from overflowing a tract of land is the difference between the value of the tract immediately before and immediately after the injury; and not the injury to the particular part submerged.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered January 7, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

G. W. Hamilton, for appellant.

McGregor & Fristoe, for respondent.

BRIDGES, J.—The plaintiff was the owner of some lands located in section 5, township 9, N., R. 24 E. W. M., in Benton county, Washington. A part of these lands were high and of comparatively little farming value; other portions were low and were good for farming purposes. Plaintiff's chief crop was alfalfa. Immediately to the north of the lands owned by him, was a county road. At a place a little to the west of plaintiff's lands, the road ran through some very low land, or what is designated a "pothole." At this point

[1]Reported in 195 Pac. 519.

the road had been built up with a view of placing it above such waters as might gather there.

In the early fall of 1918, there was an unusual amount of surface water in this locality and the road where it was built through the low lands was flooded to such an extent that it could not be traveled. In order to relieve the road of this water, the county caused a ditch to be dug from the southerly edge of the "pothole," or low lands, through which the road was built, and extended it southerly for a short distance through a natural barrier of rock and soil, so that the water flooding the road was carried off through this ditch and emptied onto some low lands adjoining the plaintiff's lands on the west causing them to be unusually flooded, and, as a result, the plaintiff's lands were also flooded, damaging some hay which had been cut and left on the ground and drowning out and destroying a considerable amount of the alfalfa in the ground.

The plaintiff began this suit to recover damages of the county because of what it had done. There was a verdict for the plaintiff in the sum of four hundred twenty-five dollars. A demurrer to the complaint on the ground that it did not state a cause of action was overruled, and at the close of plaintiff's testimony, defendant moved for a nonsuit, and at the close of all the testimony, moved for a directed verdict, and after the verdict had been received, moved for judgment notwithstanding the verdict, all of which motions the court denied. The defendant has appealed from the judgment entered on the verdict.

The appellant here first contends that it was its duty under the law to maintain this road in a passable condition, and that, in draining the water therefrom, it was in the performance of a governmental duty, and for that reason it is not liable in damages. In the first place, it may be seriously doubted whether, in doing

what it did, the county was engaged in the performance of a strictly governmental duty. Ordinarily, a municipality is engaged in the performance of governmental functions when it is looking after the peace, health and well-being of the citizens of the state, and it is not in the performance of such governmental functions when it is building or repairing roads or streets. In the case of *Sutton v. Snohomish,* 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, this court said:

"In the first place, we are of the opinion that the laying out, repairing and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. In the performance of such duties, however imposed, the municipality acts primarily for the benefit of the inhabitants of the particular locality. In preserving the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it assumes duties which are said to be in their nature solely governmental (Jones on Negligence of Municipal Corporations, Ch. IV), and for the non-exercise, or negligent exercise, of which the corporation is not generally liable to individual citizens. But the duty to keep the streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby."

However, in this case it is probably immaterial whether in doing what it did the appellant was or was not engaged in the performance of strictly governmental functions. Under the decisions of this court, it would be liable in a proper case in any event. We have consistently held that a strictly municipal corporation, such as a city, is not liable in damages brought about while it is engaged in the performance of strictly governmental functions. But we have refused to apply this rule to counties and school districts. The result is that it is the settled law in this state that a county is liable for damages, under proper facts, whether

it is engaged in carrying out a strictly ministerial duty or a strictly governmental function.

It is asserted in the briefs that there is no real ground upon which to base the distinction we have drawn between cities and counties, and we are asked to abandon our cases which hold that counties may become liable in damages resulting from the performance of strictly governmental functions. In the case of *Howard v. Tacoma School Dist. No. 10,* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917 D 792, we were urged in the same direction. There we reviewed in detail all of our decisions on this question and approved them. It is now the settled and fixed law in this state that a county may become, and a city is not, liable for damages done while engaged in the performance of a strictly governmental function.

But it is argued by the appellant that the waters which gathered on the road were surface and outlaw waters, and that it had a right to protect itself against them. In a great many cases we have laid down the general rule for which the appellant contends, but there is one exception to that general rule which, in this state, is as well established as the rule itself, and that is that one may not, by artificial means, convey surface and outlaw waters from his land and deposit them on the land of others to their damage. The latest case out of this court on the question is *Morton v. Hines,* 112 Wash. 612, 192 Pac. 1016. There, in discussing this identical question, we said:

"In these cases the owners of property sought to rid their lands of surface and percolating waters, and more or less permanent water beds, which were wont by nature to collect or rest thereon, by confining the water to artificial channels and casting it in a body on the lands of the adjoining proprietors. In the present case, and in the several cases we have cited as analogous in principle, the proprietors were but fencing

their own lands against the encroachment of surface water arising from sources apart and away therefrom. Owing to these differences in the facts, this court has applied to them different principles of law, holding in the one class of cases that the acts were wrongful and subject to restraint by the courts, and in the other that the land proprietors acted within their just rights."

In the case of *Noyes v. Cosselman,* 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937, this court said:

"When the waters are confined by natural barriers, so that the same do not run from such confinement naturally, the appellant may not construct a ditch on his own land so as to cast the waters which do not naturally pass therefrom on to his neighbor, to the material injury of such neighbor."

See, also, *Wood v. Tacoma,* 66 Wash. 266, 119 Pac. 859; *Peters v. Lewis,* 28 Wash. 366, 68 Pac. 869; *Sullivan v. Johnson,* 30 Wash. 72, 70 Pac. 246. The facts of this case come squarely within the doctrine of the foregoing cases. The appellant would have had a right to protect itself against these surface waters by the raising of its road or the building of embankments upon its own property, even though those acts should cause the lands of others to be flooded to their damage; but here the appellant has dug an artificial ditch by means of which it sought to rid itself of these surface waters by casting them on the land of others. This it had no right to do.

It is further contended that the court's instruction with reference to the measure of damages to respondent's land was incorrect. That instruction informed the jury that the measure of damage is "the difference, if any, between the value of his tract immediately before and immediately after such injury occurred . . . ." We have no doubt this instruction was correct. The only argument made against it is that it should have been to the effect that the damage should

be measured by the difference in the value of the land submerged, before and after the injury complained of, rather than the difference in the value of the whole tract before and after. The damage to the particular portion of the land submerged might have been one sum, and the damage to the whole tract, because a part of it had been submerged, might be another sum. The respondent owned this whole tract and was entitled to have it remain in its normal condition. Any damage to any portion of it would be a damage to the whole tract. The instruction given by the court is supported by the case of *Kincaid v. Seattle,* 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

We do not find any error in the record; the judgment is affirmed.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 15826. Department One. February 7, 1921.]

HELEN BUCKLEY *et al., Appellants,* v. W. H. HARKENS *et al., Respondents.*[1]

JUDGMENTS (84)—CORRECTION IN SAME COURT—AUTHORITY. The court cannot on motion enter a second judgment while there is a valid subsisting judgment which can be vacated or modified only for the causes and in the manner specified.

SAME (70) — ENTRY — TIME OF ENTRY BY CLERK. Under Rem. Code, § 431, providing for entry of judgment by the clerk immediately on return of the verdict, the clerk's powers are confined to that time, and the court may withhold the entry, in which case the clerk can only enter a judgment by direction of the court.

SAME (81, 84, 85)—ENTRY—CONFLICT IN RECORD—CORRECTION—POWERS OF COURT—JUDGMENTS THAT MAY BE CORRECTED. A memorandum decision, after withholding entry of judgment by the clerk upon a verdict, to the effect that the court had concluded to let the judgment stand, is not a judgment; and the court may treat the

[1]Reported in 195 Pac. 250.

clerk's unauthorized entry of judgment thereon as a nullity, and on a "rehearing" of the matter, may enter a valid judgment in favor of the other party notwithstanding the verdict, without first setting aside the invalid entry.

MASTER AND SERVANT (172, 182-1)—INJURIES TO THIRD PERSONS—ACTS OF SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. In an action for injuries in a collision, whether the driver at fault was in defendant's employ at the time is a question for the jury, where it appeared that he was a salesman of defendant's motor trucks, on a salary and commission basis, and owned the automobile but was allowed forty dollars per month for its upkeep and drove it under defendant's license, and at the time had left the defendant's place of business at the close of day, for home, going out of his way to carry another employee of the defendant.

JUDGMENT (59)—ON TRIAL OF ISSUES—PARTIES. It is error to grant a judgment notwithstanding a verdict, in favor of only one party, leaving the case undetermined as to the other parties.

Appeal by plaintiffs from a judgment of the superior court for King county, Ronald, J., entered December 24, 1919, in favor of one of the defendants, notwithstanding the verdict of a jury for plaintiffs, in an action in tort, after a trial on the merits. Reversed.

Flick & Paul, for appellants.

Stephen V. Carey and *Kerr & McCord,* for respondents.

FULLERTON, J.—In August, 1918, the respondent, W. H. Harkens, while driving an automobile on a street of the city of Seattle, ran into an automobile owned and driven by the appellant Helen Buckley, causing injuries to her person and to her automobile. Later on Mrs. Buckley, her husband joining, began an action against Harkens, his wife, and the respondent Garford Motor Truck Company, to recover in damages for the injuries suffered. The cause was brought to trial in June, 1919, before the court sitting with a jury, and on the tenth day of that month the jury returned a verdict in favor of the plaintiffs and against all of the

defendants in the sum of six hundred and twenty-five dollars. On the return of the verdict, counsel for the defendants gave notice of their desire to move for judgment notwithstanding the verdict, whereupon the court instructed the clerk to withhold the entry of judgment on the verdict until its further order. In due time counsel filed a motion for such a judgment and, in the alternative, for a new trial, which motion came on for hearing on June 14, 1919. At the conclusion of the hearing, the court made an order which was recorded by the clerk in the following language:

"Motion for a new trial and motion for judgment *non obstante veredicto* denied as to Harkens, and taken under advisement as to other defendant."

On August 9, 1919, the court rendered a written decision on the motion as follows:

"I have concluded in this case, though with some grave doubts, to let the verdict stand. An exception will be allowed."

Thereupon the clerk, without further direction by the court, entered in the journal the following judgment:

"The entry of judgment having been heretofore ordered withheld pending ruling on motions *non obstante veredicto* and for a new trial and the motions being now denied, in compliance with the statute judgment is hereby entered in favor of plaintiff, Helen Buckley, and against defendants, W. H. Harkens and Jane Doe Harkens, his wife, and The Garford Motor Truck Company, a corporation, for Six Hundred twenty-five and no/100 ($625.00) Dollars, and for costs in accordance with verdict."

Thereafter, the precise date not appearing in the record, counsel for The Garford Motor Truck Company applied for a rehearing on the motion, which the court granted, and on December 6, 1919, reheard the motion and caused to be entered the following order:

"Motion for judgment *non obstante veredicto* is taken under advisement."

On December 24, 1919, the court entered the following judgment:

"This cause came on regularly for trial on June 6, 1919, the plaintiffs appearing by Messrs. Flick & Paul, their attorneys, and the defendant W. H. Harkens appearing by Herchmer Johnston Esq., his attorney, and the defendant Garford Motor Truck Co., appearing by Messrs. Kerr & McCord, its attorneys. A jury of twelve persons was duly empanelled and sworn to try the cause and thereupon evidence was introduced by the plaintiffs and by the defendants; the jury was instructed by the court as to the law and after arguments of counsel, the jury retired to consider their verdict and thereafter on June 10, 1919, returned into court with their verdict wherein and whereby the jury found in favor of the plaintiffs and against the defendants in the sum of $625.00, which verdict was received and filed. Upon the filing of said verdict and before the entry of the judgment thereon, the court ordered and directed that judgment on said verdict be withheld pending the filing by the defendant Garford Motor Truck Co., a corporation, of a motion for judgment notwithstanding the verdict. Thereafter and before the entry of any judgment on said verdict, the defendant, Garford Motor Truck Co., a corporation, duly filed its motion for judgment notwithstanding the verdict of the jury. Thereafter said motion came on regularly for hearing and after argument of counsel thereon the said motion of the defendant, Garford Motor Truck Co., a corporation, was taken under advisement by the court and on August 9, 1919, the court filed a memorandum decision in words as follows, to-wit:

" 'I have concluded in this case, though with some grave doubts, to let the verdict stand. An exception will be allowed.'

"After the filing of said memorandum decision and before the entry of any order or judgment by the court in conformity therewith, the court at request of defendant on August 25th, ordered that the said motion of

the defendant, Garford Motor Truck Co., a corporation, for judgment notwithstanding the verdict of the jury be set down for further argument by counsel and consideration by the court, and thereafter said motion came on for further argument on the 6th day of December, 1919, and after argument by counsel the court announced a decision granting said motion of the defendant, Garford Motor Truck Co., a corporation, for judgment notwithstanding the verdict of the jury.

"Now therefore, in conformity with said decision it is now ordered, adjudged and decreed that the verdict of the jury returned and filed herein on the 10th day of June, 1919, so far as the same affects the Garford Motor Truck Co., be and it is hereby set aside and vacated; that notwithstanding the said verdict of the jury the plaintiffs take nothing from the defendant Garford Motor Truck Co., a corporation, and that the said defendant do have and recover its costs herein against the plaintiffs."

The present appeal is by the plaintiffs from this last mentioned judgment.

The appellants first contend that the judgment entered by the clerk is a valid and subsisting judgment, finally determining the rights of the parties to the action; that a final judgment when entered has, under our practice, the finality of a common law judgment after term, and is subject to vacation or modification only for the causes and by the procedure provided by statute for the vacation and modification of judgments, or by a suit in a court of equitable cognizance for causes recognized in equity as a ground for such vacation or modification; and hence the court was without power, on the mere motion of one of the parties, to enter in the cause another and different valid judgment.

If it were conceded that the judgment entered by the clerk was, when entered, a valid and subsisting judgment, doubtless the contentions of the appellants are sound. *Buffalo Pitts Co. v. Dearing,* 37 Wash. 591, 79

Pac. 1104; *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338; *Anderson v. Anderson*, 97 Wash. 202, 166 Pac. 60; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490.

But we are unable to concede that the judgment entered by the clerk was or is a valid judgment. By the statute (Rem. Code, § 431), the clerk is empowered without the express authority of the court to enter a judgment in a civil action tried by jury immediately on the return of the verdict, but his powers in that regard are confined to the time of the return of the verdict of the jury. It is within the power of the court to withhold the entry, and if it does so, the clerk may thereafter enter a judgment on the verdict only on the direction of the court; this, on the principle that the clerk is but a ministerial officer of the court and is without judicial powers, except as they may be expressly conferred on him by statute. Judgments and orders entered by him without either the authority of the statute or of the court, although entered in the journal of the court, are therefore nullities.

In the instant case, the clerk was ordered to withhold the entry of judgment on the verdict until the further order of the court, and there was no subsequent order to the clerk to enter a judgment unless such order is found in the memorandum decision of the court filed on August 9, 1919. But we cannot conceive that this is such an order. It contains no express words to that effect, and on its face it is but an announcement of a conclusion reached by the court. Its more natural interpretation is that it was intended for the information of the parties to the cause rather than as a direction to the clerk, leaving it open to the parties to take such further action in the cause as they might deem desirable. The plaintiffs in the action, since the ruling was in their favor, were privileged, of course, to apply to

the court for a judgment on the verdict, but it was equally the privilege of the other side to make another attack.

Since, therefore, the trial court did not regard its memorandum decision as an authorization to the clerk to enter a judgment on the verdict, but treated the judgment so entered as a nullity, and since we do not find any legal reason for compelling him to treat it otherwise, we are constrained to hold that the proceeding adopted by the judgment debtor to procure a further hearing was a proper proceeding for that purpose, and that the court did not err for the reason now discussed in entering a judgment in the cause. It may not be improper to add that the better practice would have been to enter an order setting aside the former judgment, even though it were a nullity, before proceeding to enter a second judgment.

We are clear, however, that the judgment is erroneous for other reasons assigned. As we have stated, the action arose from a collision between an automobile driven by the defendant W. H. Harkens and an automobile driven by the appellant Helen Buckley. It was sought to hold the defendant Garford Motor Truck Company liable for the act of Harkens on the theory that Harkens was in the employment of the motor truck company, and that the company was liable under the doctrine of *respondeat superior*. The motion of the company for judgment notwithstanding the verdict was based on the ground that the evidence was insufficient to charge the motor company with such liability, and it was on this ground that the trial court sustained the motion and entered the final judgment in its favor.

In this we think the court erred. The evidence we need not review at length. Briefly, it tended to show, and the jury were warranted in finding, that Harkens

at the time of the accident was in the employment of the motor company as a salesman of its motor trucks; that he received as compensation for his services the sum of one hundred and twenty-five dollars per month and a five per cent commission on the selling price of all sales of trucks made by him; that, while he owned the automobile which he was driving, he was allowed forty dollars per month for its upkeep; that he had no license authorizing him to drive the automobile as his own property, but drove it under the license of and as the property of the motor company; and that no restrictions were put upon him by the motor company as to the time when or the purposes for which he could drive the car.

It would seem that, under these conditions, it would be difficult to conceive of a circumstance when it could be said as matter of law that he was not driving the car as servant and agent of the motor company; but be this as it may, there was nothing in the particular circumstance that compels the conclusion. The facts shown were that, at the close of business on the day of the accident, Harkens left the company's place of business with the automobile for the purpose of going to his home; that, on leaving, he carried another employee of the company with him, going somewhat out of his direct route to put such employee off at a ferry; and that the accident happened while he was on his way home from the ferry. We cannot think, therefore, that the verdict was without evidence in its support, and it follows that the court erred in setting it aside for that reason.

Another reason for which the appellants may complain of the judgment is that it has left the case unconcluded. As the judgment entry of the clerk was a nullity because entered without the authorization of the court, and as the subsequent judgment entered by

the court affects the motor company only, the case stands without a judgment either for or against the other defendants. The judgment was therefore erroneous in this respect.

The appellant motor company moved for a new trial. This motion has not been determined. The judgment will be reversed and remanded with instructions to overrule the motion of the motor company for judgment notwithstanding the verdict, pass upon the motion of that company for a new trial, and proceed with the cause to a final determination.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 15973. Department One. February 7, 1921.]

FRANK A. HILL, *as Trustee, Respondent,* v. WALVILLE LUMBER COMPANY, *Appellant.*[1]

CORPORATIONS (128, 129)—OFFICERS AND AGENTS—DEALINGS WITH AND FRAUD AS AGAINST CORPORATION OR SHAREHOLDERS. A banker's demand in temporary control of a corporation, to be reimbursed for interest, and a note given therefor, is not fraudulent, where he was trustee for a new corporation organized to help another out of difficulties, and agreed to "take" bonds of the new corporation at par, and borrowed money thereon to secure a working capital, at a higher interest rate than borne by the bonds; his demand for reimbursement for the difference in interest being acceded to by the adverse interest.

SAME (189-1)—CORPORATE BONDS—PURCHASE OF BONDS—OR LOAN OF CREDIT. There was not an actual purchase of bonds, but a mere loan of credit to a corporation which was bound to make reimbursement of the difference between the interest paid on the bonds and on money borrowed thereon, where a banker and associates agreed to "take" at par the bonds of a new corporation, which took over assets of another in difficulties, the banker to have temporary control of the corporation and to borrow money for a working capital, the matter being referred to as an "underwriting."

[1]Reported in 195 Pac. 247.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered December 17, 1919, upon findings in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed.

M. M. Lyter and *Forney & Ponder* (*Hyman Zettler*, of counsel), for appellant.

Raymond J. McMillan and *Ernest K. Murray*, for respondent.

FULLERTON, J.—This is an action brought by Frank A. Hill, as trustee in bankruptcy of the property of Charles S. Gilchrist, against the Walville Lumber Company, a corporation, to recover upon two promissory notes, the one for fifteen hundred dollars, bearing date of September 8, 1914, and the other for six hundred and twenty-five dollars, bearing date of August 15, 1915, executed and delivered to Gilchrist by the lumber company at the times of their respective dates. The defense was want of consideration. The trial was had by the court sitting without a jury and resulted in a judgment in favor of Hill. The lumber company appeals.

The facts leading up to the execution of the notes and which are thought to show a want of consideration for their execution are in substance, these: In 1908, the Walworth & Neville Manufacturing Company was a corporation organized and doing business under the laws of the state of Michigan. It owned a lumber plant located in that state, and owned similar plants severally located in the states of Mississippi, Tennessee and Washington. The value of the plants in the first three of the states named is not shown by the record. The plant in the state of Washington was of considerable value, and consisted of timber lands and timber land contracts, a lumber mill, logging roads and

logging equipment, with the usual accessories that go with such property.

The corporation was heavily indebted, and in the month of October of the year named was unable to meet its obligations as they matured, and was placed in the hands of a committee selected by its creditors. This committee gave the officers of the company a year's time within which to extricate the company from its financial difficulties. The business was placed in the general charge of one William M. Carpenter, the corporation's vice-president, and this officer employed to assist him in the work one David B. Gann, an attorney of Chicago. As the work of settlement progressed, it was found that sufficient funds could not be raised from the eastern assets of the corporation to satisfy the creditors. There was needed some one hundred and twenty-five thousand dollars in cash more than they were able to obtain from that source, and Mr. Gann came to the state of Washington for the purpose of raising this sum upon the corporation's assets in this state.

The indebtedness of the corporation exceeded one million dollars. Of this sum, more than three hundred and fifty thousand dollars was owing to creditors within the state of Washington, a large part of which was secured by mortgages on the company's property situated in this state. Among its unsecured indebtedness, was an obligation of some seventy-five thousand dollars for money advanced by the United States National Bank of Chehalis. Of this bank, Charles S. Gilchrist was vice-president and manager, and one of its principal stockholders. Associated with him as stockholders were F. B. Hubbard, George Dysart, J. T. Veness, George E. Burge, and J. W. Daubney, certain of whom were also trustees of the bank.

On reaching this state, Mr. Gann sought the assistance of Mr. Gilchrist in raising the money necessary to satisfy the corporation's creditors. Various conferences were had between them in some of which the cotrustees of Mr. Gilchrist in the bank above named participated. The interest of Mr. Gilchrist and his cotrustees in the scheme arose from the fact that they desired to save the corporation from its imminent bankruptcy, in the hope that it might ultimately pay the somewhat large indebtedness due their bank. The parties finally reached an agreement at a conference held in Portland, Oregon. It was reduced in writing in the form of letters passing from Gann to Gilchrist on the one side, and from Gilchrist to Gann on the other, both of which were dictated by Gann. The letter from Gann to Gilchrist (omitting the immaterial matters) was as follows:

"In confirmation of the final arrangement settled upon here yesterday in regard to the reorganization of the affairs of the Walworth & Neville Manufacturing Company, we beg to say that we shall at once proceed to take steps looking to the organization of the East and West Companies as outlined. The West Company, to be called the Walville Lumber Company, is to be organized in Washington and will take over the Walville plant, lands, timber, equipment, right to use of all the special cross-arm machinery, and the wharf and agency interest of the present concern. The plant, lands and timber are to be bonded for $650,000 payable in equal annual installments over a period of not to exceed 10 years, with interest at 6% payable semi-annually; $125,000 of these bonds you are to take at par and with this and other money which we shall raise, the remaining $525,000 of bonds, or such part of them as may be required and possibly some of the Eastern assets, we are to make a settlement with our creditors. The Centralia indebtedness of approximately $75,000 is to be shifted to the East Company and assumed by it and when our affairs have been re-

adjusted, if any West bonds remain, we will apply them, if you then so desire, to the payment of the $75,000; otherwise this $75,000 is to be reduced in at least the same proportion, as future payment shall be made to the other general creditors.

"We are relying upon you to assist us in arranging the management of the company along some such lines as we discussed with you yesterday."

Gilchrist's reply was as follows:

"If the plan for the organization of the Walville Lumber Co. as outlined in yours of the 13th shall be consummated, my associates and I will take the $125,000 of the $650,000 issue of bonds of the Walville property and pay you par therefor on delivery on or about August 1st next."

Following the execution of the agreement, the appellant corporation was organized with a capital stock of one million dollars. The stock was subscribed for by the parent corporation and paid for by the transfer from the old to the new corporation of all of the former's property and assets within the state of Washington. The new corporation assumed all of the Washington indebtedness of the old, issued and delivered to the old company its bonds in the sum of six hundred and fifty thousand dollars, and pledged its property as security therefor. Afterwards, Gilchrist and his associates advanced to the old company the sum agreed upon. The money was borrowed from a Seattle bank; Gilchrist and his associates giving their note therefor and pledging the bonds received by them as security for the payment of the note. At the time the advancement was made, Gilchrist insisted that sufficient of the stock of the new corporation be transferred to him and his associates to give them a controlling interest therein. This agreement was also put in writing, Gann dictating the form thereof. It read as follows:

"I have received of the Walworth & Neville Manufacturing Company, 3755 shares of the capital stock of the Walville Lumber Company, which I am to hold as trustee for said Walworth & Neville Manufacturing Company for its benefit, until the $75,000, now owing in Centralia to the United States National Bank and others, shall have been liquidated and until I personally and my associates shall be relieved of the obligations now existing against us, arising from the underwriting of $125,000 of bonds of the Walville Lumber Company.

"When the indebtedness above referred to shall have been liquidated, as aforesaid, and we shall be relieved of said obligations, this trust shall terminate and the said shares of stock are to be surrendered to the Walworth & Neville Manufacturing Company, its successors or assigns."

Of the new corporation, one Neville was made manager. He was an officer and stockholder of the old corporation and, at the time it was placed in the hands of the creditors' committee, was its general manager. He and Mr. Gann became trustees of the new corporation. The other trustees, constituting a majority of the board, were selected by Mr. Gilchrist and his associates. The corporation subsequently retired its bond issue, and by its retirement satisfied in part the debt to the Seattle bank they were pledged to secure. The note given the bank by Gilchrist and his associates bore interest at the rate of eight per cent per annum. The bonds bore interest at six per cent. This difference of two per cent was paid by Mr. Gilchrist personally, and, owing to the time the obligation was outstanding, amounted to a considerable sum. When it reached approximately five thousand dollars, Mr. Gilchrist sent a statement of the amount to Neville, as manager of the new corporation, and requested that notes of the corporation be sent him to cover the

amount. Neville took the advice of Mr. Gann on the matter, and, receiving his approval, executed notes in the name of the corporation to cover the stated amount and sent them to Gilchrist. As the notes matured, they were paid in part and renewed in part. Notes were given, also, for additional interest as it matured, which were likewise paid in part and renewed in part as the exigencies of the corporation necessitated. The notes in suit represent the balance of this interest account unpaid at the time the trustee in bankruptcy took possession of the property of Mr. Gilchrist after the institution of the bankruptcy proceedings against him.

The appellant, in support of its claim that the notes were issued without consideration, argues that the transaction between Mr. Gann on the one side and Mr. Gilchrist and his associates on the other, by which the latter took bonds to the amount of one hundred and twenty-five thousand dollars issued by the appellant at the time of its organization, was in fact a sale and purchase of the bonds and hence any obligation the purchasers incurred in procuring the money with which to make the purchase was their own obligation, and not an obligation for which the appellant corporation owed any duty, either legal or moral, to assume or pay. To the charge that it did assume the obligation and did pay it in part, it answers that its acts in this respect were not voluntary; that it was then under the dominion and control of Mr. Gilchrist and his associates, certain of their number being on its board of trustees and constituting a majority of its board, and that, in substance and effect, the assumption was at their direction; that they as trustees of the corporation caused the corporation to pay them as individuals an obligation incurred by them for purposes other than the purposes of the corporation.

Noticing, first, the latter part of this argument, it is at once apparent that it is in effect a charge of fraud against Mr. Gilchrist and his associates. As to this, the record makes it clear that there was no actual fraud. There was no meeting of the board of trustees of the corporation by which it was directed to assume and pay the obligation, nor is it shown that the associates of Mr. Gilchrist, who were members of such board, knew that it had been assumed and paid in part by the corporation until long after their connection therewith had ceased. That Mr. Gilchrist himself acted in good faith is also borne out by the record. It was his contention from the beginning that he and his associates were not purchasers of the bonds; his contention was, and at all times has been, that they were merely loaning their credit to the parent corporation that it might redeem itself from its existing financial embarrassment and continue as a going concern. True, there was a motive for the act other than a mere desire to aid the corporation. This motive was to keep the corporation a going concern that it might ultimately pay the large obligation it owed to the bank of which he was vice-president and manager. His judgment was that the scheme adopted would enable the corporation to pay its obligation. That his judgment was sound, subsequent events abundantly proved. Nor does Mr. Gann or Mr. Neville make any charge of actual fraud. They were likewise both trustees of the appellant corporation, and in so far as there were opposing interests on the board, they represented the opposing interest. Their version of the affair is that, while they did not recognize the obligation as one owing by the appellant corporation, they felt that they could not then afford to antagonize Mr. Gilchrist by denying his request or by making it a subject of consideration of the trustees as a body. They say that the

appellant, after its organization, owing to its inability to find at all times a ready market for its products, was at times unable to meet its obligations as they matured, and that Mr. Gilchrist tided it over these times of difficulty by advancing for its use the necessary funds. That these advancements were required somewhat frequently; that at times they amounted to large sums; that the corporation had no other source from which funds could be obtained; and that disaster would certainly result if Mr. Gilchrist withdrew his support, hence they felt compelled to acquiesce in his request. If, therefore, there was fraud in the transaction at all, it was constructive, rather than actual fraud, and this in turn depends on the answer to the question whether the obligation assumed was in fact the obligation of the corporation.

On this latter question we are inclined to the view of the trial court. The appellant rests its contention largely on the letters passing between the parties at the Portland meeting. These, standing alone, lend color to the contention, but when viewed in the light of the surrounding circumstances, we think they will bear another interpretation. While they appear to be somewhat carelessly worded, there is but little doubt that they were prepared with care and that the language used was carefully considered. It must be remembered that the letters were not the work of novices. On the one side was an able and distinguished lawyer, and on the other business men of capacity used to dealings in large affairs. It will be noticed that the wording is to "take" the bonds. Nowhere in either of the writings is the word "purchase" used, and while we may freely concede that, under other conditions, the agreement could be found to be an agreement for a sale and purchase, yet it is capable of another construction, and what this construction should be is, to our minds, made

clear by the writing passing between the parties at the time the agreement was consummated. In this writing the agreement is referred to as an "obligation now existing against us, arising from the underwriting of one hundred and twenty-five thousand dollars of bonds of the Walville Lumber Company." This language, it seems to us, can have but one meaning. It means that the transaction was a guarantee of a loan in that sum made to the corporation on the security of the bonds, not an outright purchase of the bonds.

The oral testimony introduced by the parties as explanatory of the transaction, we shall not review. It is enough to say that it is conflicting, and does not decidedly preponderate in favor of either contention.

It would be unprofitable to pursue the inquiry further. In our opinion, the judgment should stand affirmed, and it will be so ordered.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16023. Department One. February 7, 1921.]

ALVION ERICSON, *Appellant*, v. ELLA ERICSON, *Respondent*.[1]

DIVORCE (100, 104)—CUSTODY AND SUPPORT OF CHILDREN—GROUNDS FOR AWARD OF CUSTODY—MODIFICATION. It is error to dismiss an application to modify a decree of divorce with reference to the custody of minor children, without evidence, for the reason that a similar application made a few months before had been denied on the merits, and because of indefiniteness in the allegations, where it was alleged that conditions had changed and the welfare of the children was at stake.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 17, 1920, dis-

[1]Reported in 194 Pac. 234.

missing an application to modify a decree of divorce awarding the custody of children. Reversed.

Tucker & Hyland (*Ford Q. Elvidge,* of counsel), for appellant.

Dwight N. Stevens, for respondent.

FULLERTON, J.—On November 19, 1918, the appellant, Alvion Ericson, was granted a decree of divorce from the respondent, Ella Ericson, in an action instituted by him for that purpose in the superior court of King county. There were two children, the issue of the marriage, Dorothy, nine years of age, and Alvion, three years of age. In the decree, both of these children were awarded to the "temporary custody" of the mother, and the appellant was required to contribute to their support in the sum of forty-five dollars per month. On December 29, 1919, the appellant petitioned the court in which the divorce decree was rendered for a modification of the provision of the decree with reference to the custody of the children by awarding their care and custody to him. As grounds for making a change in the custody of the children, the petition set forth the following:

"That said children are not being properly trained or taken care of; Dorothy has become a nervous, hysterical child and has reached the age where it is necessary that in order to bring her up properly and have her physically and mentally strong that she be removed from her present surroundings; that the boy Alvion is of a nervous temperament and is not at all trained and is improperly taken care of; that neither of said children are allowed to play outside, nor are they permitted to go away from their mother at any time whatsoever and that the present condition of the mind of the defendant is such that she is of a very hysterical, nervous temperament, is subject to fits of screaming and frightening said children so much so

that she is not a fit person to have their custody and that her mental condition is growing worse from time to time, and if said children are permitted to remain with the defendant they will soon develop the same mental strain; that for the last two months the defendant's actions have been such that she has lost control of herself and cannot properly take care of said children."

Due notice of the filing of the petition was given the respondent and the matter came on for hearing before the court on January 16, 1920. At that time the respondent appeared in the proceeding by counsel who stated orally to the court that the application was but a renewal of an application made some three months before by the petitioner which was duly heard and determined in favor of the respondent, and who orally moved its dismissal. After some colloquy between the court and counsel, the motion was granted, the order of dismissal reciting "that all of the issues were fully tried and disposed of within a period about two months and a half preceding this hearing." The order also contained this further provision, namely:

"Ordered, Adjudged and Decreed that the amount of alimony herein and delinquent the first day of February, 1920, is the sum of $105; and further that the sum of $165 is past due for taxes and the sum of $150 on installment payments due upon the house occupied as a residence by said defendant and her children; and that the plaintiff be, and he is hereby, required to pay into court at this time the amount of arrears in alimony in the sum of $100; and that he further beginning with the 19th day of January, 1920, pay the sum of $45 each and every month in accordance with the terms of the decree, and until the further order of the court in the premises; and that the proceedings herein for an order to show cause be and the same is hereby continued to the 20th day of February, 1920."

It is from this order that the present appeal is prosecuted.

There is a statement of facts in the record over the certificate of the trial judge to the effect that it contains all of the material facts occurring at the hearing, but it is singularly barren of any evidence justifying the finding on which the order of dismissal is based. It contains an admission of counsel for appellant that a hearing regarding the custody of the children was had at about the time named, but it is denied that the hearing involved the questions presented by the petition then before the court. The record is also barren of any evidence which will justify the findings of an order made by the court with reference to the arrears in taxes, installments due upon the house, or arrears in alimony. It is said in the briefs that an application had been filed prior to the hearing for an order upon the appellant directing him to show cause why he should not pay such arrearages, but the record contains nothing showing that a hearing was had upon the application, except such as might be inferred from the order made in the present proceeding.

Seemingly, it should require no argument to show that the court was in error in dismissing the application. The charge in the petition is, in substance, mental incapacity on the part of the respondent rendering her incapable of giving the children proper care; and clearly, if this condition exists, the welfare of the children requires some change in their environment. It can be gathered from the remarks of the judge, reported in the statement of facts, that he thought the petition not sufficiently definite, that it stated conclusions where it should have stated facts. But the remedy for this form of defect is not a dismissal of the proceedings. The petition is but a pleading, and like other pleading it is capable of amendment, and the court should have directed the appellant to state the facts more particularly before entering a final order

of dismissal. But more than this, it ought not to require any very definite allegations in a petition in matters of this character to start the court upon an inquiry. The controversy is not wholly over the question whether the one parent or the other shall have the care and custody of the children. The children themselves are in a sense parties to the proceeding and their welfare should be a paramount consideration of the court.

Our conclusion is that the proceeding was dismissed without sufficient cause, and that the order of the court should be reversed, and the cause remanded with instructions to reinstate the proceedings and proceed with a hearing thereon.

It will be so ordered.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16130. Department One. February 7, 1921.]

C. O. HOSNER *et al.*, *Appellants*, v. JOHN W. McDONNELL, *Respondent*.[1]

LOGS AND LOGGING (55-58)—SALES (10, 22)—DELIVERY AND ACCEPTANCE—EVIDENCE—SUFFICIENCY. Findings that a sale of logs had been made between the parties will be sustained, where the matter depended largely on the credibility of the two parties whose testimony was conflicting, the buyer's conduct being explainable only by accepting the truth of his version that the sale was effected and that he was to send a tug for the logs as soon as they were scaled.

FRAUDS, STATUTE OF (25, 26)—SALE OF GOODS—ACCEPTANCE—DELIVERY. Rem. Code, § 5290, requiring a written memorandum of a sale of goods for $50 or over, unless the purchaser shall accept and receive part of the goods, or make a payment, does not require that the acceptance and delivery be contemporaneous with the making of the contract; but the statute is satisfied where the seller of logs authorizes the buyer to take possession after they are scaled, which was done.

[1]Reported in 195 Pac. 231.

LOGS AND LOGGING (55)—SALE (86, 87)—DELIVERY. A seller's authorization to a buyer of logs to take possession as soon as they are scaled, is a continuing authorization, which shows an intent to deliver the logs to him.

FRAUDS, STATUTE OF (25, 26)—SALE OF GOODS—ACCEPTANCE. There is a sufficient acceptance of logs sold to answer the statute of frauds where the seller had inspected them, agreed to pay for them as soon as scaled at a given price per thousand, and when scaled sent a tug for them and took possession as authorized to do.

SALES (119)—VENDOR'S LIEN—WAIVER. A seller's authority to a buyer of logs to take possession, which was done, is a waiver of a vendor's lien for the price.

NEW TRIAL (40)—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT. A new trial for newly discovered evidence should not be granted where it merely corroborated a party upon a disputed point, and would not require a different result.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 15, 1919, upon findings in favor of defendant, in an action of replevin, tried to the court on the merits. Affirmed.

Jones, Riddell & Brackett, for appellants.

Donworth, Todd & Higgins, for respondent.

FULLERTON, J.—This is an appeal from a judgment in favor of the respondent, entered in an action of replevin in which the appellants were plaintiffs and the respondent was defendant.

In the year 1919, one J. B. Wood was engaged in the logging business at a place called Squamish Harbor, situated on Hoods Canal. A part of his output consisted of cedar logs. Two separate rafts of cedar logs, the appellant's entire output prior to the transaction now in question, had been sold to the respondent, McDonnell. Sometime in the early part of May, 1919, Wood notified the respondent that he would have another raft of cedar logs ready for delivery about the middle of the month, and on Friday, May 16, the respondent visited the camp for the purpose of inspect-

ing the logs and purchasing them, if he found them satisfactory. The respondent was satisfied with his inspection, and sought to purchase the logs, but Wood was unacquainted with the current market price, and declined to enter into a contract for their sale, but promised to give the respondent the first chance to purchase them when he should determine to sell them. The parties came to Seattle together by boat, arriving there in the early morning of the following day. On reaching the wharf, and just prior to their separation, the respondent again broached Wood concerning the purchase of the logs, when Wood informed him that he would inquire as to the market value of such logs and inform the respondent of his conclusions later in the day. The logs at that time had not been scaled.

As to the subsequent transactions relating to the sale and purchase of the logs, the respondent and Wood are directly at variance. The respondent testifies that Wood called him by telephone before noon of the day they arrived at Seattle, and told him he (Wood) could get eighteen dollars and fifty cents per thousand feet net for the logs, and inquired if he would take them at that price; that he informed Wood he would take them and that Wood thereupon sold them to him at the price named; authorizing him to send a tug for them as soon as they were scaled, which time, Wood informed him, would not be later than Monday or Tuesday of the following week. The respondent further testifies that his lumber mill is on Salmon Bay, near Seattle, inside of the government locks; that he had received notice from the government officer in charge of the locks that the locks would be closed for an indefinite period commencing on the first day of June following, and that he desired to accumulate before that time a sufficient supply of logs to keep his mill in operation during the closed period; that he in-

formed Wood of these matters prior to the time the contract was entered into, and that it was because of this situation that he obtained from Wood the authorization to send for the logs as soon as the scaler had completed his work. The respondent also testifies that he was unable to find Wood in the early part of the week following the making of the contract; but, learning from the scaler himself that the logs had been scaled, sent the tug for them on Thursday, May 20. The tug reached the raft in the afternoon of the same day at about two o'clock. It immediately made fast to the raft, and after some changes in the shifter sticks enclosing the logs, proceeded to tow them to the respondent's mill, reaching there on the following Saturday.

The respondent left Seattle on the tug for the purpose of inspecting other rafts of logs. He arranged, however, with his office to pay Wood for the logs as soon as he could be found.

Wood's testimony relating the agreement to sell and the authorization to send a tow for the logs, as we have said, is directly at variance with that of McDonnell. He admits calling McDonnell on the telephone after their arrival in Seattle on Saturday morning, but relates the conversation between them as follows:

"I told Mr. McDonnell I was offered $18.50 for the logs, and that I was trying to find out the price of logs, and I was calling him up to see whether they were worth that and whether he would give that much, and he said he did not think they were worth that much, but he wanted the logs, and I said 'Well, I am offered that net for those logs and I haven't the scale bill for them yet; I haven't the scale bill, but,' I said, 'as soon as I get the logs scaled I will call you up again and make arrangements with you about the logs.' And Mr. McDonnell said 'I want them, and I will take them,' and I said 'I am not going to sell them to any-

body until I get the scale bill. After I get the scale bill I am going to give you a chance at the logs' and he said 'Will it be all right for me to send a tug after the logs?' and I said 'No sir, it will not; I am not going to sell the logs until I find out what the scale is on them, and then I will give you a chance at the logs.' That was the last that was said over the telephone and that was the last I said to Mr. McDonnell until this day, with the exception of the morning when I went to the office. Mr. Hosner and Mr. Riddell took me out there to tell Mr. McDonnell I did not sell him the logs, which I told him."

The telephone call was made from the office of Alfred E. Hodgson. Hodgson had long been Wood's attorney, and was in his office when the telephone conversation occurred. He heard, of course, only Wood's part of the conversation. He was a witness at the trial, and his evidence, to some degree at least, supports the version given by Wood.

Wood further testifies that he met the appellant Hosner shortly after his arrival in Seattle on Saturday morning; that Hosner knew he had a raft of logs, and inquired of him whether or not they were for sale; that he told him they were, whereupon Hosner offered him eighteen dollars and fifty cents per thousand feet net for them; that he told him he would inquire further about prices before he sold them, that he had given McDonnell the first chance to buy them, and would not sell them to anyone else until after McDonnell had refused to take them. He also testifies that he received the scale of the logs on Wednesday and immediately tried to get into communication with McDonnell, but could not find him; that he met Hosner on the next day, and was told by him that McDonnell had sent a tug for the logs; that he said to Hosner that he had not sold the logs to McDonnell and that McDonnell had no right to take them; that thereupon Hosner offered

to buy them at twenty-two dollars per thousand feet and that he sold them to him at that price, taking Hosner's check in payment, which he cashed two days later.

Hosner thereafter sold, or contracted to sell, the logs to his co-appellant, Phoenix Shingle Company. These parties as plaintiffs brought the present action to recover possession of the logs, causing the sheriff to seize them on their arrival at Seattle, under a replevin bond. McDonnell retained possession by the execution of a redelivery bond. The action was tried to the court sitting without a jury, with the result hereinbefore stated.

The appellants first contend that the court erred in finding that a contract of sale for the logs had been entered into between Wood and McDonnell. On this question we are constrained to take the view of the trial court. As we have shown, the immediate parties thereto are at variance, and the trial court, since he had the advantage of seeing the witnesses when testifying, was in a much better position to determine the truth than are we. McDonnell's conduct can be explained on no other theory than the theory that he thought he had purchased the logs. He is criticised because of his apparent anxiety to get possession of the logs, and because he contracted to purchase them before they were scaled. But we think his evidence offers a very satisfactory explanation of this. His anxiety to obtain immediate possession of logs was because of the contemplated closing of the locks which would cut his mill off from its source of supply. The reason he was willing to contract to purchase the logs in advance of the scaler's report was because he had then inspected the logs and knew as much about their character and quality as did the scaler. To him the scale would only ascertain the number of thousand

feet and thus fix the total of the purchase price. He did not need the scaler's report to inform himself of their intrinsic value. His testimony to the effect that he had arranged to pay Wood for the logs prior to their arrival at the mill is corroborated, and this fact, we think, weighs strongly in support of his good faith.

On the other hand, the version given by Wood of the telephone conversation is not altogether satisfactory. It is strange that he would call the respondent at all if he had not then determined to sell the logs, and more than this, his version as to parts of the conversation could hardly have taken place if his version of the conversation as a whole were true.

But it is argued that the trial court did not give consideration to the testimony of Mr. Hodgson, and that, when this is considered, it is sufficient to turn the scale in favor of the version given by Wood. Concerning this testimony, we do not read the record as the appellants read it. The court admitted the testimony in evidence when offered, and the most that can be said is that he did not attach to it that degree of importance which the appellants contend it warrants. But the question is before us for trial *de novo*. Appreciating this, we have ourselves given it careful consideration, and are not convinced, when it is considered in the light of all the circumstances shown, that it warrants a reversal of the trial court's finding.

The next contention of the appellant is that the contract of sale, conceding the respondent's version thereof to be true, is void because within the statute of frauds. This contention is founded on the fact that, at the time the contract of sale was entered into, there was no part of the purchase price of the logs paid, nor any delivery of the logs, either in whole or in part, nor anything given in earnest to bind the bargain. But

while it is true the statute (Rem. Code, § 5290) provides that no oral contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be "good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment," the rule of the statute, as we understand it, does not require that the giving of something in earnest, the part payment, or the acceptance and delivery must in all instances and under all circumstances be contemporaneous in time with the making of the contract of sale. On the contrary, where the goods sold are at a distance from the place of contract, or are of such a nature that they cannot be immediately delivered, and the seller authorizes the buyer to take possession, and he does take possession with all reasonable dispatch after the making of the contract, the sale is not void by reason of the statute. To this proposition there seems to be no substantial dispute in the authorities. In Mechem, Sales, § 401, the rule is stated as follows:

"It is not essential that the part delivery, acceptance and receipt should be at the time of making the contract. The parol agreement, unless revoked, may stand for a mutual agreed proposition, at least for a reasonable time, where none is fixed, and the subsequent acceptance and receipt, while the proposition remains open, of a portion of the goods which were the subject of the parol negotiation, will make the entire contract effective.

"And this is true even though the goods consist of several parcels, or are to be delivered in instalments at different times."

See, also, *Gabriel v. Kildare Elevator Co.*, 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, where the cases will be found collected in 10 L. R. A. 638.

The case before us has the added element, not found perhaps in any of the cited cases, namely, that the logs were not to be taken possession of by the buyer until after they were scaled, but we cannot think this in any manner affects the rule. There was an agreement that the logs were to be scaled as soon as possible, and not later than a designated time and an express agreement between the seller and the buyer authorizing the latter to take possession of the logs as soon as they were scaled. The principle underlying the rule is that contracts of this sort are executory, and thus a continuing authorization to either party to do and perform any act contemplated thereby. The contract, until sufficiently performed to take it out of the statute, may be subject to revocation by either party, but if not revoked until some act is done thereunder which so takes it out of the statute, it becomes a binding contract.

We have not overlooked the argument of the appellants to the effect that the acts of Wood, even as testified to by McDonnell, do not show an intent on his part to deliver the logs to McDonnell. But we cannot take this view of the evidence. That nothing was said or done by him subsequent to the time of making the contract evidencing such an intent is freely conceded. But at that time he expressly authorized McDonnell to take the logs as soon as they were scaled. This was a continuing authorization, as potent as it would have been had the parties met subsequent to the time and he had again directed McDonnell to take possession of the logs.

It is also argued that there was no acceptance of the logs by McDonnell. But here again we think the evidence supports the contrary conclusion. McDonnell had inspected the logs prior to the time of the making of the contract of sale, and by the contract agreed to pay for them a given price per thousand feet, the quan-

tity to be determined by the scale. This was a sufficient acceptance, and clearly after taking possession McDonnell could not have repudiated the sale. By his acts he bound himself to pay for them at the agreed price regardless of any other consideration.

It is further argued that Wood had a vendor's lien on the property to secure the purchase price, and that there was no waiver of this lien and in consequence no consummated sale. But the transaction in itself was a waiver of the lien. There was a parting on the part of Wood of both title and possession, and thereafter his sole right was to look to McDonnell personally for the payment of the purchase price.

Finally, it is argued that the court erred in refusing to grant the appellant's motion for a new trial. The motion was based on the ground of newly discovered evidence. Certain persons made affidavit to facts tending to support the testimony of Wood to the effect that a conversation McDonnell testified took place between them did not in fact take place. But, aside from other reasons which could be urged to show want of error, we cannot conclude that, were the evidence in the record, it would require a result different from the result we have indicated.

The judgment is affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 15999. Department One. February 7, 1921.]

MORGAN V. COCHRAN, *Appellant*, v. IRWIN E. COCHRAN, *Respondent*.[1]

TRUSTS (13, 19)—RESULTING TRUSTS—CREATION AND EXISTENCE—EVIDENCE—SUFFICIENCY. A resulting trust in mortgaged land is not created in favor of one who advanced part of the money to redeem from a foreclosure sale, whereby the land was restored to the mortgagor; since the mortgage was a lien only, leaving title at all times in the mortgagor, and a resulting trust does not arise in favor of one who voluntarily discharges a lien.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered January 7, 1920, upon findings in favor of defendant, in an action to quiet title. Reversed.

Stephen E. Chaffee, for appellant.

G. W. Hamilton and *Thos. H. Wilson*, for respondent.

PARKER, C. J.—The plaintiff, Morgan V. Cochran, commenced this action in the superior court for Benton county against the defendant Irwin E. Cochran, and others, seeking a decree quieting title in himself to a quarter section of land in that county.

The record brought here from the superior court indicates that the trial upon the merits proceeded as though Irwin E. Cochran was the only defendant, and resulted in a judgment decreeing title to an undivided 9/28 of the land to be in the plaintiff, and title to an undivided 19/28 of the land to be in the defendant Irwin E. Cochran, as prayed for in his affirmative answer and cross-complaint. From this disposition of the cause, the plaintiff has appealed to this court.

Respondent's claim of title to the undivided 19/28 of the land and the trial court's judgment, are rested

[1]Reported in 195 Pac. 224; 198 Pac. 270.

upon the theory of a resulting trust arising in favor of respondent and against appellant, by reason of respondent having contributed towards and paying to the sheriff of Benton county 19/28 of the amount of the redemption money necessary to redeem the land from a sale thereof made under a judgment of the superior court of that county foreclosing a mortgage upon the land.

There seems to us to be but little, if any, room for controversy over the controlling facts of this case. They may be summarized as follows: In April, 1913, appellant, being then the owner of, and vested with full legal title to, the land, executed a mortgage thereon to secure an indebtedness of two thousand dollars owing by him to the mortgagees. In September, 1916, the mortgagees were awarded judgment of foreclosure of the mortgage, by the superior court for Benton county. Execution being issued directing the sale of the land to satisfy the judgment, a sale of the land was accordingly made on October 28, 1916, at which time the Connecticut Investment Company became the purchaser of the land, resulting in a certificate of sale being accordingly issued by the sheriff to that company. Respondent alleges in his cross-complaint:

". . . during the year 1917 and prior to October 29, 1917, the plaintiff M. V. Cochran and this defendant Irwin E. Cochran made every effort to either sell the above described land or to make a loan in order to redeem it from the execution sale, the plaintiff M. V. Cochran not having the funds necessary to redeem, the plaintiff M. V. Cochran had decided to abandon the land and that prior to the 29th day of October, 1917, the plaintiff M. V. Cochran finding he was unable to procure the funds to redeem the aforesaid land from said execution sale, he, the said plaintiff M. V. Cochran, and his brother, Irwin E. Cochran, this defendant, agreed to and did jointly furnish the money to redeem the said land from said execution sale, which required

in the aggregate the sum of $2,900; pursuant to which agreement the said M. V. Cochran furnished $900 and this defendant furnished the sum of $1,900 of said amount necessary to redeem said land, all of which was paid to said sheriff of Benton county, by this defendant on the 29th day of October, 1917, whereupon the said sheriff delivered to this defendant a certificate of redemption to the plaintiff M. V. Cochran reinstating the legal title in the name of the plaintiff."

We shall assume these pleaded facts to be true except as to the appellant's decision to abandon the land, though we regard that fact as immaterial to our present inquiry. The record is wholly barren as to any information as to what understanding existed between appellant and respondent at the time of the redemption, touching the question of respondent's acquiring any interest in the land by reason of his contributing and paying towards its redemption from the foreclosure sale; nor does the record furnish us any information touching the question of what understanding existed between them at the time of the redemption as to how or when, if at all, appellant was to reimburse respondent for the amount so advanced and paid by him in effecting the redemption. There is evidence of acts and language of respondent occurring after the redemption, strongly indicating that respondent regarded the obligation of appellant to him merely as that of a debtor, owing him the amount advanced. No claim seems to have been made to the land by anyone other than appellant, until the spring of 1919, when respondent made claim to the whole of it as part of the estate of the deceased mother of appellant and respondent, respondent being then administrator of the mother's estate, which claim prompted appellant to soon thereafter commence this action to quiet his title to the land as against all of the mother's heirs, including the respondent.

We have seen that the theory of counsel for respondent is not that appellant is indebted to him, but that he is entitled to be adjudged the equitable owner of 19/28 of the land by reason of having advanced that proportion of the money which effected its redemption from the mortgage foreclosure sale. So it seems that the question here to be answered is whether or not respondent is entitled to be adjudged the owner of an undivided 19/28 of the land upon the theory that there has arisen a resulting trust in his favor against appellant, from the fact that he advanced and paid from his own money 19/28 of the amount necessary to effect the redemption of the land from the mortgage foreclosure sale.

Counsel for respondent invoke the general rule, a brief statement of which is to be found in 3 Pomeroy, Eq. Juris. (4th ed.), § 1037, as follows:

"In pursuance of the ancient equitable principle that the beneficial estate follows consideration and attaches to the party from whom the consideration comes, the doctrine is settled in England and in a great majority of the American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person, A, while the purchase price is paid by another person, B, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him."

In 26 R. C. L. 1227, the rule is stated in a form rather more directly applicable to the great majority of cases wherein it is invoked, as follows:

"If one person buys land with the money of another, even though there is no fiduciary relation, and takes the legal title in his own name, there is a resulting trust, and the legal title is a mere naked form, and only evidence of title in favor of the *cestui que* trust, because his money paid for it. And if a person having the money or means of another in his hands to invest

for the owner uses the same in the purchase of property in his own name, the law will hold him to be the trustee of the owner of the money or other consideration used in effecting the purchase."

This is not a case of a purchaser paying money which is in his hands belonging to another, as the purchase price of 19/28 of the land and taking title in himself, and thus becoming a trustee thereof for the one whose money he so paid, under the rule above noticed; but it is a case of the would-be beneficiary voluntarily paying his own money and seeking to become such beneficiary by such payment. No decision has come to our notice recognizing the creation of a resulting trust in favor of one so paying all or a part of the purchase price of land. However, the authorities seem to be that the rule invoked is applicable only to a purchase, and the passing of the legal title to land as a result of such purchase; and not to the advancement or payment of money to effect a mere redemption or discharge of a lien upon the land.

Now what was the result of the payment by respondent from his own funds of 19/28 of the amount necessary to redeem this land from the sale made under the mortgage foreclosure judgment? It has become the well settled law of this state that a mortgage, unlike a mortgage at common law, does not vest title in the mortgagee, but only creates a lien upon the land in favor of the mortgagee as against the interest of the mortgagor; and that a foreclosure sale of the land looking to the satisfaction of the mortgage debt creates no greater interest in the land in the purchaser at such sale, during the period allowed by statute within which the mortgagor may redeem. In other words, the mortgagor is not, by such sale, divested of his title to the land prior to the expiration of the redemption period, and can even then be divested of his title only upon

his failure to redeem during that period. Rem. Code, § 597; *Hays v. Merchants' Nat. Bank,* 14 Wash. 192, 44 Pac. 137; *Singly v. Warren,* 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896; *DeRoberts v. Stiles,* 24 Wash. 611, 64 Pac. 795; *Carroll v. Hill Tract Imp. Co.,* 44 Wash. 569, 87 Pac. 835.

It seems plain, therefore, that the legal title to this land and the whole thereof at all times in question remained in appellant, and that respondent did not in any sense purchase any part of the land or the legal title thereto by furnishing and paying a portion of the redemption money as above noticed. Respondent merely aided in causing, by the use of his own money, the satisfaction and discharge of the mortgage and foreclosure judgment lien during the period of redemption, and at a time when the legal title to the land remained in appellant, without any necessity of any conveyance thereof from anyone. With one exception, to be presently noticed, there has not come to our attention any decision or any expression of any text writer indicating that a resulting trust will arise vesting equitable title to real property in land from the fact of the one claiming such title having voluntarily paid from his own funds money towards the satisfaction of a lien upon the land. The authorities seem to us to imply that the doctrine of resulting trusts and the rule of their creation, as above noticed, has no application except to the transfer of the legal title to land. It may be that there are no decisions expressly so holding, but we think such an inference can be read between the lines in the following decisions: *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144; *Hanrion v. Hanrion,* 73 Kan. 25, 84 Pac. 381, 117 Am. St. 453; *Titchenell v. Titchenell,* 74 W. Va. 237, 81 S. E. 978; *Munch v. Shabel,* 37 Mich. 166.

The only decision coming to our notice which seems

to hold to the contrary of this view is that of *Tillman v. Murrell,* 120 Ala. 239, 24 South. 712. Looking to the language of that decision apart from the statement of the facts of the case, it does seem that it was there held that one paying his own money for redemption of land of another from a mortgage sale is entitled to be decreed the equitable owner of the land. The decision is very brief and cites no authority. The result may be accounted for upon the theory that the sale of the land in satisfaction of the mortgage vested legal title in the purchaser even during the redemption period, which seems to be the law of some states, and possibly is of Alabama, though as to this we are not advised. However, looking to the facts in that case as stated preceding the court's opinion, it appears that the redemption money was paid in pursuance of an oral agreement by the terms of which the one who paid the money was to receive conveyance of the land, which conveyance he did receive before the controversy in that case arose, it being one in which the creditors of the original owner claimed that the land was subject to their rights. That decision, we think, should not be regarded by us as of controlling force in favor of respondent.

Counsel for respondent cite and quote from the text of 39 Cyc. 125, as follows:

"As a general rule the nature of the sale or conveyance by which the title to property, paid for with one person's money, is acquired by another, is immaterial, provided it is sufficient to pass the legal title to the person against whom the trust is sought to be declared; and if the circumstances are sufficient for that purpose a resulting trust will arise, although the property is purchased at a judicial sale."

Counsel's thought seems to be that this view of the law argues that what respondent did towards the re-

demption of the land was within the spirit of the rule of the creation of resulting trusts. It seems to us that this quotation from Cyc. argues to the contrary, in that it, like all the authorities, except *Tillman v. Murrell, supra,* inferentially refers to the rule as applicable only to the passing of the legal title to land.

While in the cross-complaint of respondent there is added to the prayer that he be adjudged the owner of an undivided 19/28 of the land, a prayer for "such other and further relief as to the court may seem meet and just in the premises," there is no argument advanced in the briefs of counsel for respondent that he is entitled to any other relief than that he be adjudged to have title to the land to the extent of an undivided 19/28 thereof, according to the specific prayer of his cross-complaint. We are therefore not deciding any question other than that of the title to the land. The wife of appellant also is a party plaintiff and appellant with him, and of course will share with him the fruits of this litigation. We have omitted her name from our discussion merely for convenience of expression.

We conclude that the judgment of the superior court must be reversed, and the cause remanded to that court with directions to enter judgment quieting title to the whole of the land in appellant as against the claim of title thereto made by respondent. It is so ordered.

MACKINTOSH and BRIDGES, JJ., concur.

ON REHEARING.

[*En Banc.* June 1, 1921.]

PER CURIAM.—This cause was reargued before the court *En Banc* on May 24, 1921, in pursuance of the granting of respondent's petition for rehearing. Deeming ourselves fully advised in the premises, we are of the opinion that the cause was correctly disposed of by

the decision of Department One. For the reasons therein stated, the judgment is reversed as in the Department opinion directed.

[No. 16035. Department One. February 7, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Martha J. Deshler, Appellant,* v. E. H. DESHLER, *Respondent.*[1]

PARENT AND CHILD (3, 4)—CUSTODY—WELFARE OF CHILD—COMPETENCY OF PARENT. Upon habeas corpus proceedings by a mother to obtain from the father the custody of a son eight years of age, the child's welfare is a primary consideration, and the discretion of the lower court in awarding the custody to the father will not be disturbed, where the evidence indicated an unusually close association between them and better school facilities and indicated that conditions could not be bettered by the change.

Appeal from a judgment of the superior court for Stevens county, Neal, J., entered October 27, 1919, upon findings in favor of the defendant, denying a writ of *habeas corpus* to obtain custody and possession of a minor child, after a trial to the court. Affirmed.

Zent & Jesseph, for appellant.

W. Lon Johnson and *Wentz & Bailey,* for respondent.

PARKER, C. J.—This is a *habeas corpus* proceeding under Rem. Code, § 1064, commenced in the superior court for Stevens county, wherein the relator, Martha J. Deshler, seeks recovery from the defendant, E. H. Deshler, her husband, of the custody of their minor son, John Clark Deshler, who, at the time of the trial of the cause upon merits, was nearly eight

[1]Reported in 195 Pac. 226.

years old. The trial resulted in findings and a judgment reading as follows:

"It is ordered, adjudged and decreed and this does so order, adjudge and decree that the defendant, E. H. Deshler, be given and he hereby is awarded the custody and control of the minor, John Clark Deshler until the further order of this court, subject to provision herein stated.

"And it is further ordered, adjudged and decreed as follows:

"That the relator have the right at any and all times to visit said child at his home, and that she have the right to have the custody of said child on Saturday and Sunday in each week. When necessary, defendant to convey said boy to relator and return if within twelve miles of relator, the child's health permitting, and weather conditions being such as will permit said child safely and conveniently to leave his home and travel over the roads to the place of abode of relator, such right to continue so long as the relator shall remain in the state of Washington.

"That relator may have the custody of said boy if she so desires during summer school vacations at her own expense, and within Stevens county, and subject to visits by the father.

"That in case the relator returns to the state of Missouri, and thereafter elects to visit said child, that the defendant pay to the relator, once each year, in advance upon demand by mail, at such time as she elects to make such visit, the sum of $200 to defray her expenses on such visit from Missouri and return. Such visit to be made within twenty days after such payment by defendant.

"That such child shall not be removed from the state of Washington, except upon permission of the court had by order duly made upon hearing had after timely notice to the other party . . ."

From this disposition of the cause in the superior court, the relator has appealed to this court.

The controlling facts, as we view them, may be summarized as follows: Respondent and appellant are

husband and wife. At the time of the trial in the superior court in September, 1919, appellant was fifty-one years old, while respondent was then forty-seven years old. They were married some twelve years prior to that time. Both of them had been twice married before their marriage to each other. Appellant had several children by her former husband, all of whom are now married and caring for themselves. Respondent has no children other than the minor son whose custody is here in question. Appellant and respondent were both born in the state of Missouri. He continued to make his home there until March, 1918. She continued to make her home there until April, 1919, and may possibly be considered as maintaining her residence there, even up to the present time, though, as we proceed, that fact will appear to be somewhat doubtful.

They seem to have considered their respective property rights as separate by reason of the manner in which they were acquired. In any event, their respective properties seem to have been so managed at all times since their marriage. Each seems to be well able, so far as material possessions are concerned, to care for this minor son. Appellant's property is in Missouri, while respondent's property is in Stevens county in this state. The married life of these people has been attended by a lack of harmony of such a pronounced character that it now seems that they have both resolved to no longer live together, though they have made no agreement to that effect. To here review in detail the causes of this lack of harmony and their acts and words towards each other evidencing it, would be but to unnecessarily relate a distressing story. In the spring of 1918 their relations had become so strained that she gave him to understand that she wished him to leave, saying to him, according to

his testimony: "You go away and I hope I will never hear from you." Whether or not these were her exact words we need not decide, but the facts and circumstances disclosed by the evidence seem to us to show that this was then what she meant him to understand as her settled state of mind towards him. Nor can we think that she was justified in entertaining such a pronounced dislike for him, though we do not say that he was wholly blameless for the lack of harmony existing between them. This, we think, is as far as we need go touching the question of which one was most at fault in the bringing about their inharmonious relations, since this is not a question of divorce.

The evidence seems to show that the association of this young son with his father, respondent, had, at least for a year or two previous to that time, been more intimate than such association would ordinarily be between a father and a son of that age, in that respondent repeatedly took the son with him to his work in the fields and on trips to town, with a view of caring for the son at such times, thus relieving in a measure the mother from that degree of care and responsibility a mother would ordinarily have of a child of that age. This seems to have been done a great many times, not with the mere approval, but in compliance with the expressed wish of appellant, made seemingly to the end that she be not bothered with the care of the son at such times, and without any other reason therefor on her part. Respondent testified in part as follows:

"One morning she got mad when I was going horseback because I would not take him; she wanted me to take him; I says, I cannot take him today, and she says, you can; I says, if I take him I will take him and will not come back; she says, if you want to go, I never want to hear from you. During the time after he reached three years he was in my custody nearly

all the time. I took him with me when I went to work, where I was plowing on the farm a whole lot. I took him up to my brother's with me lots of times."

Respondent also testified that he asked appellant to go away with him and establish a new home, which she refused to do. On March 27, 1918, appellant and respondent were living upon her farm in Missouri, where they had resided for some years. On that day, while she was away from home visiting neighbors, respondent put the personal effects of himself and the son in his Ford automobile, and with the son drove away from their home with the intention of never returning. He left no word as to where he and the son were going. Indeed, he seems not to have had any very definite destination in view, though he then probably thought he would sooner or later meet his brother somewhere in the Northwest. Sometime later he and the son visited some of his brother's wife's people in Montana, where he worked for a while. Later, he and the son came to Stevens county in this state, where he and his brother acquired a ranch of considerable size and value, the title being taken in the brother's name, but in which the brother acknowledges that respondent has an interest. They are operating this ranch as partners. The brother testified that respondent's interest in the ranch, including the stock, is worth approximately twenty thousand dollars. They have, on the part of the ranch which seems to be regarded as respondent's, a well-built and equipped dwelling house worth four thousand five hundred dollars to five thousand dollars, in which the brother and his wife and their young son live. With them respondent and his son live as members of the family. It is plain from the evidence that the son is well cared for, both as to his physical and moral well-being, the brother's wife caring for him as a mother. There is a good public

school within a hundred and fifty yards of their home where school is in session nine months of the year, which the son attends at all times when school is in session. The testimony is very convincing that the son could hardly be better surrounded and provided for, apart from the one fact that he is not living with both of his parents under like favorable and harmonious conditions.

Appellant did not learn where respondent and the son were until in the spring of 1919, nearly a year after they left Missouri, though she apparently made considerable effort to find them. In April of that year, having learned that they had come to Stevens county, she came to Colville with a view of seeing and getting control of the son. Upon her arrival there, she procured an automobile and drove out to the Deshler ranch some eight miles north of Colville. Upon her arrival, there seemed to be some disposition on the part of respondent to prevent her seeing the son. However, she was permitted to visit with him, evidently as long as she desired to at that time, but did not attempt to take him away, apparently being given to understand that she could not do so. She returned the next day and visited with the son about an hour.

A few days later, she commenced this proceeding in the superior court for Stevens county. The record shows that she was by the superior court awarded temporary custody of the son during several different periods, of a week or so each, before the trial of the case, when she had him with her at Colville. She remained in Stevens county up until the time of the trial, which occurred September 25, 1919, five months after she came to Stevens county. Whether or not she intends to reside in Washington in the future, instead of in Missouri, is not made plain. In her testimony she says:

"My old home is in Mercer county, Missouri; it is the only home I have now, but I am living here in Stevens county, now. I am living with Mr. and Mrs. Butler. I am not employed by them. I have a room there; I am renting a room from them; I am paying for it, in money, by the month. I don't know whether I will return to Missouri; I don't know what I will do. I don't know as I would return to Missouri if this child is awarded to me."

At the conclusion of the trial, the son was taken by the trial judge into his chambers and examined in the presence of counsel for both appellant and respondent, but not under oath, appellant and respondent neither being present. That examination seems to show that there had not been instilled into his mind any ill will or prejudice towards either his father or mother. He said he liked them both, and he did not seem to realize that there were any serious differences between them. He plainly evidenced a desire to stay on the farm with his father, rather than go back with his mother, should that mean his going back to Missouri. This desire of the son is, of course, of slight consequence in view of the fact of his being only eight years old, but is not to be entirely ignored. While, as we have noticed, appellant is possessed of about as much property as respondent, we cannot bring ourselves to believe, in the light of the evidence, that her home in Missouri is surrounded with influences as conducive to the son's mental and moral welfare as is the home of respondent in this state. Her Missouri home is about one and one-half miles from the nearest school, where school is in session but six months of the year. Besides, there was an environment there for which one of appellant's grown sons seems largely responsible, which not only promoted unhappiness in their home, but also may well be regarded as detrimental to the son's moral welfare.

We do not think it necessary to here review in detail the facts leading us to this conclusion. We would not want it understood that we deem appellant unfit morally for the care of this son; but, as between her and respondent, we are fully convinced that he, in so far as personal disposition and temperament are concerned, is as well, if not better, endowed than she is.

If this were a case of appellant's seeking to obtain the care and custody of this son as against a third person, we could readily hold that his welfare would not call for the award of his care and custody to such third person as against her. In such a case her parental right would turn the scale in her favor, in the absence of a very strong showing touching her unfitness. But we have no such case here. This is a controversy over the custody of this son between his parents, each of whom has, under ordinary circumstances, equal right to his care and control. There seems, then, but little, if anything, for us to here consider, other than the son's welfare.

Under the conditions as disclosed by this record at the time of the trial in the superior court—and we must view them as of that time—we cannot say that the trial court abused his discretion in leaving the son with respondent, the father, subject to the privileges of appellant, the mother, as specified in the court's judgment which is here on review. We do not want to be considered as condoning the acts of respondent in taking the son away from Missouri and bringing him to Washington, and his failure for a period of nearly a year thereafter to inform appellant of where he and the son were. This act of respondent would no doubt weigh against him in this controversy were we here called upon to decide only the rights of appellant and respondent as against each other, apart from the question of the son's welfare. But, the latter

being the controlling question to be decided, we cannot escape the conclusion that we would not be warranted in disturbing the judgment of the trial court.

If the son be left with respondent, under present conditions, and appellant should remain in Stevens county, and no divorce be sought by either appellant or respondent, of which there seems to be no indication at this time, it seems not wholly improbable that these people may again resume their marriage relations and found a new home together in this state, wherein both may have the full enjoyment of association with this young son. Such a desirable result we think is more likely to follow from the present disposition of this case than by granting to appellant all she here prays for.

The judgment is affirmed.

HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 15997. Department Two. February 9, 1921.]

E. M. SKOUG, *Respondent*, v. LATOUR CREEK RAILROAD COMPANY, *Appellant*.[1]

CONTRACTS (110, 154)—MODIFICATION — MERGER — BREACH — ACTS CONSTITUTING. Whether a contract for railroad construction work was indefinite or not, the parties had a right to modify it, hence it is not a breach to fail to perform the original contract but the breach is by the party failing to perform his part of the modified contract.

CONTRACTS (157, 159)—BREACH—WAIVER—RIGHTS ON PARTIAL PERFORMANCE. Where railroad contractors notified the company that they could not complete the contract, whereupon the company agreed to modify the contract upon plaintiff's purchasing his partner's interest, which was done and plaintiff resumed the work under the modified contract, he is entitled to the reasonable value of the work done.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered April 5, 1920, upon findings in favor of the plaintiff, in an action to recover for labor performed in constructing a logging railroad, tried to the court. Affirmed.

McWilliams, Weller & Brown, for appellant.

Ed. B. Powell, for respondent.

MOUNT, J.—This action was brought by E. M. Skoug against the Latour Creek Railroad Company, to recover for work and labor done in the partial construction of a logging railroad in the state of Idaho. Upon issues joined, the case was tried to the court without a jury, and resulted in findings and judgment in favor of the plaintiff for $1,873.42. The defendant has appealed from that judgment.

The facts may be briefly stated as follows: On November 4, 1916, Mr. Skoug and Mr. J. G. Bromley,

[1]Reported in 195 Pac. 219.

co-partners doing business as the Inland Construction Company, entered into a contract with the appellant for the construction of a logging railroad. This contract was in writing and provided, among other things, that the work should be done by the Inland Construction Company for a consideration of ten thousand dollars to be paid in payments as the work progressed. After the construction company had entered upon the work, some difficulty arose between the construction company and the railroad company. The construction company ceased work and Mr. Skoug advised the railroad company that he could not proceed with the contract. Thereupon the president of the railroad company agreed with Mr. Skoug that, if he would purchase the interest of his partner in the contract, the contract would be modified so that he could proceed and finish the work.

On this understanding, Mr. Skoug purchased the interest of Mr. Bromley in the contract, which was assigned to Mr. Skoug. Thereupon the president of the railroad company wrote a letter, as follows, to Mr. Skoug:

"Cataldo, Idaho, Sept. 21st, 1917.

"On condition that E. M. Skoug will continue and prosecute the work of construction of the Latour Creek Railroad without delay and will obtain some men on contracts approved by the Latour Creek Railroad Company to help him finish said construction work, the Latour Creek Railroad Company hereby agrees to keep their engineer on the work at all times to direct and pass upon the work as done with power to make such changes in the plans of construction as is necessary under present conditions to save unnecessary labor and expense and to avoid duplication of the work. Also that they will furnish laborers and a cook and will furnish supplies as needed along the line as the work progresses and will furnish a man to run the motor car to haul ties and materials,

and after the ties and track are laid they agree to furnish sufficient money to complete the job. The cost of the above to be deducted from the contract price. As an offset to damage done to the Latour Creek Railroad by the log drives of the spring of 1917, the Latour Creek Railroad Company agrees to pay extra over and above the contract price the cost of repairing and replacing and putting in condition to be accepted by the Railroad Company all grading, clearing, filling and cribbing damaged and caused by the logging operations and log drives on Latour Creek during spring of 1917, on entire road, and also to pay for replacing all timber destroyed or driven out by the spring drive of 1917. Said cost shall be determined by keeping the time separate from other work by contractor and to avoid disputes about said time the Railroad Company shall check said time each day from contractor's time book, wages to be $4.50 per day for contractors and wages actually paid to the other men.

"Latour Creek Railroad Company,
"By L. W. Butler, Its President."

Pursuant to this letter, the respondent again entered upon the work and continued it for a time, when the appellant neglected or refused to furnish laborers and a cook, and failed or refused to furnish supplies as needed along the line. Because of that failure, it was impossible for the respondent to continue the work, and he thereupon abandoned the work and brought this action.

A number of errors are assigned by the appellant, but these errors are discussed under the following heads: (1) That the original contract was an entire or indivisible contract and was breached by the respondent, and (2) that the original contract was not modified by the letter hereinabove quoted.

It is true that the original contractors, after they had entered into the performance of the work, ceased work thereon and threatened to abandon the contract. Their excuse for this was that the appellant had bor-

rowed money from them which appellant had agreed to return as it might be needed for the work; that the appellant failed to return the money, and for that reason they were unable to proceed with the work and had to abandon the contract. If the appellant was not at fault and had stood upon the original contract, there might be some reason for contending that the contract is indivisible, but appellant did not stand upon the original contract. Appellant agreed with the respondent that, if he would purchase the interest of his co-partner in the contract, appellant would modify the terms of the original contract and permit the respondent to proceed to finish the work. The respondent relied upon this promise, purchased the interest of his co-partner in the contract, and thereupon the original contract was modified as stated in the letter above quoted. It is clear from this letter that the original contract price was maintained and that the respondent was required to finish the work and in addition thereto to do some extra work; and in consideration for this, the appellant agreed to furnish laborers and a cook and the needed supplies along the line of the work as it progressed. Appellant also agreed to furnish sufficient money to complete the work. The respondent entered upon his duties under the contract as modified by that letter, and after he had proceeded for a time, the appellant neglected or refused to furnish the laborers and the cook and the needed supplies so that the respondent was unable to finish the work. The breach of the contract, therefore, was the breach of the appellant rather than of the respondent.

At the trial of the case, the court made an accounting between the parties and determined therefrom that the respondent was entitled to the amount for which judgment was entered. The record is amply sufficient

to sustain the findings of the court upon the question of the amount due respondent.

We are satisfied that there is no substantial merit in the contentions of the appellant that the original contract was an indivisible one, for it is plain that, whether it was indivisible or not, the parties to it had a clear right to modify it in any respect they desired. They did modify it by the subsequent written agreement and the respondent renewed work under that agreement. He is clearly entitled to the reasonable value of the work which he has done.

Judgment affirmed.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 16336. *En Banc.* February 14, 1921.]

THE STATE OF WASHINGTON, *on the Relation of J. T. Ronald, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

COUNTIES (4)—CLASSIFICATION—STATUTES—CONSTRUCTION. Under Laws 1919, p. 154, § 1, fixing the salary of all superior court judges in the state at $4,500, with the proviso that judges in counties of the first class shall receive a salary of $5,000, judges in "class A" counties are not within the proviso, in view of Laws 1919, p. 490, § 1, declaring that counties of 210,000 population shall be known as "Class A" and of 125,000 to 210,000 as "first class" counties; since there is no ambiguity in the act or room to resort to construction.

Application filed in the supreme court January 25, 1921, for a writ of mandamus to secure the issuance of a state warrant. Denied.

Preston, Thorgrimson & Turner, for relator.

The Attorney General and *O. R. Schumann*, for respondent.

[1]Reported in 195 Pac. 1018.

TOLMAN, J.—Plaintiff, one of the judges of the superior court of the state of Washington for King county, on behalf of himself and the other judges of the same court for the same county, by an original action brought here, seeks a writ of mandate directed to the state auditor requiring him to issue to them warrants upon the state treasurer on the basis of five thousand dollars annual salary to each, alleging that all of such judges were duly and regularly elected at the general election of 1920 for four year terms beginning on the second Monday of January, 1921; that their salary is fixed by statute at five thousand dollars per annum, and that the defendant, claiming that such salaries are fixed at four thousand five hundred dollars per annum, has refused, and throughout the term will refuse, to issue warrants on the basis of five thousand dollars, or on any other basis than an annual salary of four thousand five hundred dollars for each.

We are thus called upon to construe chapter 77, of the Laws of 1919, which, so far as is here material, reads as follows:

"Each judge of the superior court shall receive an annual salary of four thousand five hundred dollars ($4,500.00): *Provided,* that in counties of the first class each judge of the superior court shall receive an annual salary of five thousand dollars ($5,000.00)." Laws of 1919, p. 154.

This language is clear and unequivocal, and it seems necessary to inquire only as to whether King county is a county of the first class. Prior to the act of 1917 (Laws 1917, Ch. 88, p. 327), King county was so classified, but that act provides:

"All counties having a population of over two hundred and fifty thousand (250,000) shall be known as Class 'A' counties."

This act was in effect at and before the time of the introduction and passage of Ch. 77 of the Laws of 1919; and at the same session and to take effect at the same time, the legislature passed a general act classifying all counties in the state and fixing the compensation of county officers (Laws 1919, Ch. 168, p. 490), which provides:

"Section 1. For the purpose of regulating the compensation of county officers and for all other purposes herein provided for, the several counties of the state are hereby classified according to their population as follows:

"Counties containing a population of 210,000 or more shall belong to and be known as Class A Counties;

"Counties containing a population of 125,000, and under 210,000 shall belong to and be known as counties of the first class."

An able and somewhat persuasive argument is presented by the plaintiff which might be convincing were the language of the act in question ambiguous, equivocal, or subject to more than one construction; but here the legislative intent clearly appears from the language used, and to attempt by construction to change or vary its obvious meaning would be to usurp the functions of the legislature. Manifestly, to make the proviso apply to class A counties, the actual words describing such counties must be read into it, and there is nothing in the act which in any wise justifies the argument that the legislature intended this should be done. The law of statutory construction is too well settled to permit of such a course.

"In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification. It is a very well-settled rule that, so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public

policy; and it is the plain duty of the court to give it force and effect. But in obedience to the cardinal rule of ascertaining the intention of the legislature, if more than one significance may reasonably be attached to the language used, or a literal construction will make the act absurd, or will lead to injustice, the court may properly resort to construction." 36 Cyc. 1114.

It cannot be argued here that a literal construction will make the act absurd or lead to injustice, because we cannot assume that there was any good reason known to the legislature why judges in class A counties should receive more compensation than the judges in counties otherwise classified.

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. In such a case arguments from the reason, spirit or purpose of the legislation, from the mischief it was intended to remedy, from history or analogy for the purpose of searching out and justifying the interpolation into the statute of new terms, and for the accomplishment of purposes which the lawmaking power did not express, are worse than futile. They serve only to raise doubt and uncertainty where none exist, to confuse and mislead the judgment, and to pervert the statute." 25 R.C.L. 957.

And again:

"The courts have no legislative powers, and in the interpretation and construction of statutes their sole

function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the legislature. They cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. If the true construction will be followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the legislature." 25 R.C.L. 963.

It seems useless to multiply authorities in support of the rule so clearly announced in the quotations just made; but among the cases holding to the rule are the following: *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, 622, 122 N. W. 31, 26 L. R. A. (N.S.) 1022; *Tenant v. Kuhlemeier*, 19 Ann. Cas. 1026, and note following; *United States v. Ninety-nine Diamonds*, 139 Fed. 961; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Bartlett v. Lanphier*, 94 Wash. 354, 162 Pac. 532.

The language of the act, "each judge of the superior court shall receive an annual salary of four thousand five hundred dollars ($4,500.00)," refers to every judge of the superior court in the state, except only as limited by the proviso that, "in counties of the first class each judge of the superior court shall receive an annual salary of five thousand dollars ($5,000.00)." Class A counties not being covered by the proviso, we are not called upon to construe the effect of the proviso or determine whether the legislature had any sufficient reason for distinguishing and differentiating as to the judges in counties of the first class, or if it had such reason whether it had the power to do so.

The writ will be denied.

PARKER, C. J., HOLCOMB, MACKINTOSH, BRIDGES, MAIN, and FULLERTON, JJ., concur.

[No. 16081. *En Banc.* February 15, 1921.]

FRED KLIPPERT, *Respondent,* v. INDUSTRIAL INSURANCE DEPARTMENT *et al., Appellants.*[1]

MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—AWARD—LIMIT—STATUTES—CONSTRUCTION. Under Laws 1919, p. 355, § 4, which provides a specific schedule of awards to workmen in extra hazardous employments for certain permanent partial disabilities, followed by a general provision for compensation for any other permanent partial disability in the proportion that the same bears to the scheduled disability which it most closely resembles, "but not in any case to exceed $2,000," the $2,000 limitation does not apply to the scheduled disabilities but only to the "other" unscheduled disabilities provided for in that paragraph.

SAME (20-1)—PERMANENT PARTIAL DISABILITIES—AWARD FOR FURTHER ACCIDENT — STATUTES — CONSTRUCTION. To the extent of the scheduled awards to workmen in extra hazardous employments for certain permanent partial disabilities, Laws 1919, p. 355, § 4, the law is mandatory; and the provision in subd. g (p. 363) to the effect that, in case of a further accident to a recipient of a lump sum, his final compensation shall be adjudged with regard to the combined effect of his injuries, cannot be applied to contract or limit the award in case of another disability within the schedule.

MOUNT and MACKINTOSH, JJ., dissent.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered July 27, 1920, in favor of the plaintiff, upon overruling a demurrer to the complaint, upon an appeal and action to reverse an award by the industrial insurance commission, for personal injuries. Affirmed.

The Attorney General and *Frank P. Christensen, Assistant,* for appellants.

Newman, Howard & Kindall, for respondent.

HOLCOMB, J.—On December 4, 1917, respondent, while engaged in an extra hazardous occupation, re-

[1]Reported in 196 Pac. 17.

ceived an injury which resulted in the loss of one eye by enucleation, for which he received compensation from the industrial insurance commission in the sum of twelve hundred dollars. On July 9, 1919, he was again injured while engaged in an extra hazardous occupation, which injury resulted in the loss of his major arm at the shoulder. He duly made claim to the appellant commission for compensation for the latter injury, and on November 25, 1919, he was awarded time loss from October 9, 1919, to November 6, 1919, in the sum of $48.45, and an award for permanent partial disability in the sum of eight hundred dollars. The commission, in making the award for permanent partial disability, notified respondent that, under the statute, the award for the injury would have been nineteen hundred dollars; but, by reason of the award of twelve hundred dollars previously made for the loss of an eye, it was limited to the sum of eight hundred dollars as compensation for the second injury, since the statute provides that two thousand dollars is the maximum amount payable by law for a permanent partial disability.

Notice of appeal from this final award was given by respondent, and he filed a complaint setting forth the facts herein stated praying for judgment reversing the decision of the commission, and that it be directed by the court to award respondent the sum of nineteen hundred dollars for the loss of his major arm, and for time loss in the sum of $48.45.

Appellant's demurrer to the respondent's complaint was by the court overruled, and judgment reversing the decision of the commission and directing it to award to respondent the sum of nineteen hundred dollars for the loss of his major arm, and the sum of $48.45 for time loss, was entered upon appellant's announcement that it would stand upon its demurrer

and decline to further plead. From this judgment, entered July 27, 1920, the commission appeals to this court, and contends that the lower court erred in (1) overruling defendant's demurrer to the claimant's complaint, and (2) in directing that an award be made to plaintiff in any sum in excess of eight hundred dollars for the loss of his major arm.

The workmen's compensation act, as originally enacted, provided as follows:

"(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where the ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of $1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability.

"(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act." Laws of 1911, p. 360, § 5, (Rem. Code, § 6604-5).

These two sections were before this court in the case of *Biglan v. Industrial Ins. Comm.*, 108 Wash. 8, 182 Pac. 934, wherein it was held that where one has suffered a permanent partial disability and received a lump sum payment therefor, upon the sustaining of a second permanent partial disability, his compensation is to be adjusted according to the combined effect of his injuries and his past receipt of money under the act. The *Biglan* case was decided upon a case arising under

the original act above quoted. The legislature amended the law in 1917, and also in 1919, so that the law now reads as follows:

"(f) Permanent partial disability means loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where the ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability. For the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows:

Loss of one leg amputated so near the hip that an artificial limb cannot be worn	$2,000.00
Loss of one leg at or above the knee so that an artificial limb can be worn	1,900.00
Loss of one leg below the knee	1,300.00
Loss of the major arm at or above the elbow	1,900.00
Loss of the major hand at wrist	1,600.00
Loss of one eye by enucleation	1,200.00
Loss of sight of one eye	900.00
Complete loss of hearing in both ears	1,900.00
Complete loss of hearing in one ear	500.00

"Compensation for any other permanent partial disability shall be in the proportion which the extent of such other disability shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of two thousand dollars ($2,000.00). . . .

"(g) Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

"Should such further accident result in the permanent total disability of such injured workman, he shall receive the pension to which he would be entitled notwithstanding the payment of a lump sum for the prior injury." Laws of 1919, Ch. 131, p. 362, § 4.

The amendment last quoted above is the same as that amendment made to the 1911 law and subdivisions (f) and (g) by Ch. 28, Laws of 1917, p. 81, § 1, and appellants contend that these amendments are substantially the same as the 1911 act, except that the law now specifies and sets forth a schedule of awards to be made by the commission for the specific injury, and that the maximum amount to be received is raised from fifteen hundred dollars to two thousand dollars. In the 1911 act, it is specified that the loss of one major arm above the elbow shall be deemed a permanent partial disability. The 1919 act does not specify what injury constitutes a maximum, but it is therein specified that two thousand dollars is the sum to be awarded for the loss of one leg amputated so near the hip that an artificial limb cannot be worn, and it recites that the payment shall not in any case exceed the sum of two thousand dollars. Appellants therefore contend that this case is governed by our decision in *Biglan v. Industrial Ins. Comm., supra.*

The statute we had before us in the *Biglan* case did not provide for a specific schedule of compensation to be awarded to injured workmen. The present statute does provide a specific schedule and declares that, for the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows: "Loss of the major arm at or above the elbow $1,900; loss of one eye by enucleation $1,200." The general provision following the schedule relates to compensation for any *other* permanent partial disability, and declares that it shall be in proportion to the extent that such *other* disability (that is not in the schedule above) shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed

the sum of two thousand dollars. This maximum of two thousand dollars clearly relates to nothing else than an unscheduled disability which may be rated by the commission as a permanent partial disability.

The enactment of this specific schedule of awards certainly indicates that, from experience in the operation of the industrial insurance compensation system, it was found best to fix and make certain specific amounts for specific injuries, and not leave injuries to be classified by the commission with only the maximum for their guidance.

We have always endeavored to interpret the industrial insurance act liberally with a view of accomplishing the result intended, which was, as stated in the first case we decided bearing upon the act and upholding its constitutionality, to substitute for an unscientific and burdensome system a system which will make an award in all cases regardless of the cause or manner of infliction, limited in amount, it is true, but commensurate in some degree with the disability suffered. *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599. See, also, *Peet v. Mills,* 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915 D 154, L. R. A. 1916 A 358; *Stertz v. Industrial Ins. Com.,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918 B 354; *Foster v. Industrial Ins. Com.,* 107 Wash. 400, 181 Pac. 912.

There is some uncertainty as to the meaning of subdivision (g) of the amendment of 1919, Laws of 1919, p. 363, providing that, where

"a further accident occurs to a workman who has been previously the recipient of a lump sum payment under this act, his final compensation shall be adjudged according to the other provisions of this section, and with regard to the combined effect of his injuries and his past receipt of money under this act."

Thus, under the last clause of the above subdivision, the commission, acting with cautious discretion, thought that they were required to deduct the amount already received from the maximum amount possible to be received by a disabled workman under the act. But statutes must be construed as a whole and that construction given, where possible, that will harmonize the entire statute and make it sensible and effective. 2 Lewis' Sutherland's Statutory Construction (2d ed.), § 489. Applying these principles to the construction of the statute before us, it is manifest that, in enacting the schedules provided in the acts of 1917 and 1919, materially changing the phraseology and legal effect of the original act of 1911, the legislature intended to provide for all cases of disability permanent in character but partial in effect; and in adopting the schedule therein, to provide for definite amounts for those certain specified injuries, the amount being graduated according to the magnitude of the injury. To the extent of such specific provisions, the law is mandatory, and being mandatory, cannot be enlarged or contracted beyond its express terms. The provision in the last paragraph of subdivision (f) of § 1, of the act of 1919, providing for compensation for other permanent partial disability, is very general, broad, and comprehensive, and leaves no room for distinction between the injuries specifically provided for in the schedule and those which fall under these general provisions. *In re Maranovitch,* 65 Ind. App. 489, 117 N. E. 530; *In re Good,* 65 Ind. App. 426, 117 N. E. 520.

It is probable that the last clause of subdivision (g) refers to the general provisions of the last paragraph of subdivision (f), or to injuries to the same member which has been previously compensated within the maximum, and to which a subsequent injury was sustained,

and still leave the injured workman only permanently partially disabled; as, for instance, where he may lose a leg below the knee and receive thirteen hundred dollars, and afterwards while engaged in a hazardous occupation, sustain another injury resulting in the loss of that leg at or above the knee, so that an artificial limb could be worn, thus leaving him entitled to only the difference between thirteen hundred dollars and nineteen hundred dollars; or he might sustain the loss of the same leg so that an artificial limb could not be worn entitling him to two thousand dollars, and in that case the commission would be required to regard the combined effect of his injuries and his past receipt of money, so that he would be entitled to the difference between what he had received and what he would be entitled to for the maximum of the scheduled loss; otherwise it would be impossible to harmonize the provisions of subdivision (g) with the rest of the act. Subdivision (f) provides that, for the permanent partial disabilities here specifically described, "the injured workman shall receive compensation as follows:" then fixes the amount for each such injury and therein provides for compensation of twelve hundred dollars for the loss of an eye by enucleation, and nineteen hundred dollars for the loss of the major arm above the elbow.

We consider that the *Biglan* case, *supra,* does not govern this case. We are of the opinion that the present statute means exactly what it says, and that the commission was in error in its award, and the trial court was right.

The judgment of the trial court is affirmed.

PARKER, C. J., TOLMAN, FULLERTON, and BRIDGES, JJ., concur.

MOUNT and MACKINTOSH, JJ., dissent.

[No. 16091. *En Banc.* February 15, 1921.]

JOHN J. MALIM *et al.*, *Appellants* v. HENRY BENTHIEN *et al.*, *Respondents.*[1]

CONSTITUTIONAL LAW (101, 103)—DRAINS (1)—SPECIAL PRIVILEGES—EQUAL PROTECTION OF THE LAWS. The diking and drainage act, Rem. Code, § 4107, is unconstitutional in that it denies equality and grants special privileges to some which it denies to others, in the provision by which the judgment upon maximum benefits is made final and conclusive as to the landowners, but not as to the commissioners who may as often as they please have the same opened or avoided by like proceedings to the same effect.

SAME. The diking and drainage act, Rem. Code, § 4107, is unconstitutional in that it denies equality and grants special privileges to some which it denies to others, in the provision whereby owners of land within the district proper are entitled to vote at elections governing the district and the levy of taxes, while others in the extended area taxed for the improvements have no vote or voice in the matter.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 7, 1920, dismissing an action upon sustaining a demurrer to a complaint for an injunction. Reversed.

Gordon & Nolte and *Bates & Peterson,* for appellants.

F. Campbell and *Frank D. Nash,* for respondents.

TOLMAN, J.—Hylebos Creek Diking District was duly organized under the diking and drainage act of 1895, and its boundaries fixed at the time of such organization. Under the amendatory act of 1913, Laws of 1913, p. 267; Rem. Code, § 4107, the respondents, as the board of commissioners of the district, instituted proceedings in the superior court for Pierce county, setting up that lands without the district as originally established were being benefited by the diking system

[1]Reported in 196 Pac. 7.

which had been installed, and sought to have the lands in such extended area outside of the original district assessed for the benefits thus received. A hearing was had, the petition granted, and a jury empaneled to try the issue of the benefits to the land within the extended area for the purpose of future assessments to pay the cost of the maintenance of the system. Appellants here, plaintiffs below, were all defendants in that proceeding, duly served with process, and therein contended that their lands were not benefited by the maintenance of the diking system, and also there raised the question of the constitutionality of the statute. The jury found that the lands in the extended area were all benefited by the diking system, assessed the benefits separately against each tract of land for the specific purpose, stated in each verdict, of the future maintenance of the system, and a judgment and decree was entered upon the verdict, from which no appeal was ever taken.

Thereafter this action was brought by appellants to enjoin the levying and collection of the assessments against their lands lying within such extended area. They charge that, in causing the maximum benefits to be assessed, the commissioners of the diking district acted arbitrarily, fraudulently, capriciously and upon a wholly unfair and inequitable rule in fixing the maximum benefits to the several tracts of land belonging to them respectively, causing the amount of the benefits to vary from twenty per cent of the maximum benefits to seventy-five per cent in some instances of the true maximum benefits received, and that, by reason thereof, the cost of maintenance of the said improvement cannot be apportioned ratably and equitably; and also charge that the statute is unconstitutional and void as violative of § 12, art. I, of the constitution of the state of Washington, and of the rights,

privileges and immunities conferred by § 1 of the fourteenth amendment to the constitution of the United States, and of the fifth amendment to the constitution of the United States. A demurrer to the complaint was sustained, and the plaintiffs electing to stand on their complaint, judgment of dismissal followed, from which this appeal is prosecuted.

If the statute be in fact unconstitutional and void, then there was no law authorizing such a proceeding as that complained of, the court was without jurisdiction, and its judgment would be not voidable, but absolutely void. *Elliott v. The Lessee of William Peirsol,* 1 Peters (U. S.) 328, 7 Law Ed. 326; *Kizer v. Caufield,* 17 Wash. 417, 49 Pac. 1064; *McNamee v. Tacoma,* 24 Wash. 591, 64 Pac. 791; *State ex rel. Redlinger v. Superior Court,* 113 Wash. 244, 193 Pac. 676.

The statute under which it was sought to assess appellants' lands, so far as here material, is as follows:

"If at any time it shall appear to the board of diking commissioners that any lands within or without said district as originally established are being benefited by the diking system of said district and that said lands are not being assessed for the benefits received, or that any lands within said district are being assessed out of or not in proportion to the benefits which said lands are receiving from the maintenance of the diking system of said district, and said board of diking commissioners shall determine that certain lands, either within or without the boundaries of the district as originally established, should be assessed for the purpose of raising funds for the future maintenance of the diking system of the district, or that the assessments on land already assessed should be equalized by diminishing or increasing the same so that said lands shall be assessed in proportion to the benefits received, said commissioners shall file a petition in the superior court in the original cause, setting forth the facts, describing the lands not previously

assessed and the lands the assessments on which should be equalized, stating the estimated amount of benefits per acre being received by each tract of land respectively, giving the name of the owner or reputed owner of each such tract of land, and praying that such original cause be opened for further proceedings for the purpose of subjecting new lands to assessment or equalizing the assessments upon lands already assessed, or both.

"Upon the filing of such petition, summons shall issue thereon and be served on the owners of all lands affected, in the same manner as summons is issued and served in original proceedings, as near as may be, and if such new lands lie within the boundaries of any other diking district, said summons shall also be served upon the commissioners of such other diking district.

"In case any of the new lands sought to be assessed in said proceeding lie within the boundaries of any other diking district, and the diking commissioners of such other district believe that the maintenance of the dike or dikes of such other district is benefiting lands within the district instituting the proceedings, said diking commissioners of such other districts shall intervene in such proceedings by petition, setting forth the facts, describing the lands in the district instituting the proceedings which they believe are being benefited by the maintenance of the diking system of their district, and praying that the benefits to such lands may be determined and such lands subjected to assessment for the further maintenance of the diking system of their district, to the end that all questions of benefits to lands in the respective districts may be settled and determined in one proceeding, and such petitioners in intervention shall cause summons to be issued upon such petition in intervention and served upon the commissioners of the diking district instituting the proceeding and upon the owners of all lands sought to be affected by such petition in intervention." Laws of 1913, p. 267, § 1; Rem. Code, § 4107.

A careful examination of the part of the statute quoted indicates a two-fold purpose: first, to subject

to assessment all lands benefited by the diking system whether within or without the district, which have not theretofore been assessed for benefits received, and to require such lands to pay their *pro rata* for the maintenance of the diking system thereafter without limitation as to time; and second, that, where lands within the district are being assessed out of or not in proportion to the benefits received, to equalize by diminishing or increasing the assessment thereon so that all lands affected shall be assessed in proportion to the benefits received, and permitting the opening of the original cause for either or both of these purposes.

Appellants contend that the statute violates § 12, of art. I, of the state constitution, which provides, in effect, that no law shall be enacted granting to any citizen privileges or immunities which, upon the same terms, shall not be equally open to all citizens; and argue that, by the terms of the statute, the diking commissioners may at any time file a petition in the superior court in the original cause praying for a readjustment or redetermination of the question of maximum benefits, but the statute does not give to the landowners any right to initiate any proceedings for such purpose, and that, by reason thereof, the commissioners may litigate the question of maximum benefits as often as they see fit, the judgment entered being final and conclusive as to the landowners, but never final, conclusive or *res judicata* as to the commissioners, they being privileged to reopen the cause and relitigate the matter as often as they see fit, each time obtaining a judgment final and binding upon the landowners, but which they may avoid by instituting like new proceedings until such time as they obtain a judgment satisfactory to them.

The statute seems open to the construction thus put upon it, and if we were to meet the argument thus ad-

vanced, and could demonstrate that this provision does not grant to the commissioners the privileges which are not open to the landowners and which the constitution forbids, we would then be met by appellants' further contention that the statute violates § 19, of art. I, providing that all elections shall be free and equal, and that it denies the principle of self-government, as it existed from our earliest history and is preserved in our constitution taken as a whole. These contentions are based upon the fact that, while the statute does grant the landowners of the extended area a right to appear and defend in court against the assessment upon their lands, it affords them no other right, and gives them no voice in the election of the commissioners of the district, and no means of being heard in the conduct of its affairs. The voters owning the lands within the limits of the district proper, as constituted before the extended area is found to be benefited, remain the sole governing power and the only electorate, and retain in their hands, as before, the entire power and authority to conduct all of the affairs of the district without regard to the rights or wishes of the owners of land in the extended area, and may, by the means thus granted to them, say what the annual cost of maintenance shall be, leaving the inarticulate owner in the extended area to silently pay what they will.

This statute which we are now considering was considered and held to be constitutional by a Department of this court in *State ex rel. Conner v. Superior Court*, 81 Wash. 480, 143 Pac. 112, but it is only fair to say that none of the points now urged were raised or argued in that case. We are not now satisfied that the fact that diking districts are municipal corporations only in a limited sense, having no power to incur obligations payable by general taxation, affects the ques-

tion. They are *quasi* municipal corporations, and their officers are elected and exercise their powers by reason of the municipal or public character of the corporation which they represent. What fairness or equality can there be in permitting the electors of the district proper to have the sole power to elect its officers, dictate its policy, and determine what money shall be spent and how, in the maintenance of the system, so long as time shall last or the dikes may be kept effective, while those without the district proper and subject to its taxing power, having no voice whatever in the selection of its officers or determining its policy, shall be called upon to pay their *pro rata* of the maintenance year after year without any limitation of time? To uphold such a course would be a denial of the principle upon which our government is founded, and which as a nation we have always maintained is the only true principle upon which a free government can be founded and maintained.

Among the many authorities which support these views are the following: Cooley, Taxation (3d ed.), p. 250; *Pacific Sheet Metal Works v. Roeder,* 26 Wash. 183, 66 Pac. 428; *Anderton v. Milwaukee,* 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830; *People v. Dooley,* 75 N. Y. Supp. 350, 63 N. E. 815; *Waters v. Langdon,* 40 Barb. (N. Y.) 408; *Gulf, Colorado etc. R. Co. v. Ellis,* 165 U. S. 150; *State v. Garbroski,* 111 Iowa 496, 82 N. W. 959, 82 Am. St. 524, 56 L. R. A. 570; *Durkee v. Janesville,* 28 Wis. 464, 9 Am. Rep. 500; *Magoun v. Illinois Trust & Sav. Bank,* 170 U. S. 283, 42 Law Ed. 1037; *People ex rel. Bolton v. Albertson,* 55 N. Y. 50; *Wells v. City of Weston,* 22 Mo. 384, 66 Am. Dec. 627.

We are forced to the conclusion that, in the two particulars hereinbefore pointed out, the statute is unconstitutional, in that it denies equality and grants privileges to some which it denies to others; that

State ex rel. Conner v. Superior Court, supra, so far as it announces a contrary doctrine, should be and is overruled; and the judgment appealed from is reversed, and the cause remanded with instructions to overrule the demurrer.

PARKER, C. J., MITCHELL, BRIDGES, MOUNT, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 15956. Department One. February 17, 1921.]

DANIEL O. BOYD *et al., Respondents,* v. JOSEPHINE NORTH *et al., Appellants.*[1]

FORCIBLE ENTRY AND DETAINER (5)—PROCESS—TIME FOR SERVICE. The service of summons in forcible entry and detainer prior to the filing of the complaint is sufficient.

SAME (5). Rem. Code, §§ 221 and 222 prescribing the requirements of a summons for the commencement of general actions does not apply to actions of forcible entry and detainer.

LANDLORD AND TENANT (127)—RECOVERY OF POSSESSION—UNLAWFUL DETAINER—RIGHT TO MAINTAIN. The lessor is entitled to recover possession in an unlawful detainer action, under Rem. Code, § 812, subd. 4, and the express provisions of § 827, upon the lessee's violation of a covenant not to assign or sublet, without regard to the form of the assignment.

SAME (24, 28, 39-2)—TERM FOR YEARS—ASSIGNMENT AND SUBLETTING—COVENANTS AND CONDITIONS—BREACH. A lease for a term of years containing a covenant not to assign or sublet without the consent of lessor entitles the lessor to a forfeiture regardless of whether the lease expressly provided for a forfeiture on breach of such covenant, where the evidence shows that the lessees had assigned the lease.

SAME (144)—TERM FOR YEARS—UNLAWFUL DETAINER—ASSIGNMENT—EVIDENCE—ADMISSIBILITY. In an action of unlawful detainer, on breach of a condition not to assign the lease, the testimony of a witness that she accounted to the assignee for receipts of the operation of the premises is admissible to show the assignment.

[1]Reported in 195 Pac. 1011.

SAME (145)—UNLAWFUL DETAINER—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the assignment of a lease in violation of a covenant not to do so without the written consent of the lessor, where it is shown that a witness had accounted to the person to whom it was alleged the lessees had assigned the lease for the receipts from the operation of the apartment building.

SAME (148) — TRIAL — INSTRUCTIONS. Under the statute, Rem. Code, § 827, intending unlawful detainer as a remedy for breach of a condition against assignment and subletting without the landlord's consent, it is proper to give instructions permitting the jury to find such assignment and subletting without direct evidence on the matters.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 18, 1920, upon the verdict of a jury, rendered in favor of plaintiffs, in an action of unlawful detainer, after a trial on the merits. Affirmed.

H. E. Foster, for appellant Antill.

James B. Murphy, for appellant North.

Jay C. Allen (*E. W. Howell,* of counsel), for respondents.

FULLERTON, J.—By a written indenture of lease, the respondents Boyd leased to the appellant North certain real property situated in the city of Seattle on which there was an apartment building, for a term of years commencing on September 1, 1919, and terminating on October 31, 1924. The lease contained a covenant against assignment and covenants against subletting the premises in whole or in part, and provided that, for a breach of any such covenants, the lessors could, at their option, declare a forfeiture of the lease and reenter the premises, either with or without process of law.

Mrs. North, on the delivery of the lease, took possession of the premises. Later on the lessors found a person in possession of the premises other than Mrs.

North, and conceiving that there had been an assignment of the lease and a subletting of the premises, caused to be served upon the lessee, the person in possession, and the appellant Antill, a notice to comply with the conditions of the lease or surrender the premises within a period of ten days; further notifying them that, if they failed so to do, they would be "proceeded against according to law as and for unlawful detainer and the cancellation of said lease." The notice was not complied with and on December 10, 1919, the present action was begun against them under the statute of forcible entry and detainer to oust them from the premises and cancel and set aside the lease. After issue joined, the cause was tried before the court sitting with a jury, and resulted in a verdict and judgment against the appellants, North and Antill, for a restitution of the premises, with damages, and a cancellation of the lease.

On commencing the action, the respondents caused service of the summons to be made on the appellants prior to the time the complaint was filed with the clerk of the court in which the action was entitled. The appellants appeared specially and moved to quash the service for this reason, and for the further reason that the summons served did not conform to the provisions of the statute. The trial court overruled the motion and required the appellants to answer to the complaint. Its action in so doing forms the basis for the first error assigned.

As to the first branch of the motion, the appellants concede that this court has decided contrary to their contentions in the cases of *Security Sav. & T. Co. v. Hackett,* 27 Wash. 247, 67 Pac. 607, and *McGrew v. Lamb,* 31 Wash. 485, 72 Pac. 100, but argue that the cases are not sound in principle and were in effect overruled by the subsequent case of *Big Bend Land Co. v.*

Huston, 98 Wash. 640, 168 Pac. 470. We cannot accept either of these conclusions. The reasons for holding that the failure to file the complaint prior to the time of the issuance and service of the summons is not fatal to the service are fully stated in the first of the cases cited and need not be repeated here. It is enough to say that we see no reason for changing the rule therein announced. Nor can we conclude that the subsequent case cited in any way varies the rule. The precise question was not there presented. The summons was issued and served after the filing of the complaint, and the question under consideration was whether the summons was sufficient in form to comply with the statutes. We held the summons insufficient and in so doing announced the rule that the statute conferring jurisdiction in actions of forcible entry or forcible detainer must be strictly pursued, but this holding in no way modified or varied the rule of our prior cases which hold a service of a summons, sufficient in substance and form, prior to the filing of the complaint, to be a compliance with the statute.

The contention that the summons did not conform to the provisions of the statute is likewise unfounded. It is not disputed that the summons was in form and substance that required by the special statute relating to forcible entry and detainer (Rem. Code, §§ 817, 818); but it is objected that it does not comply with certain of the requirements of a summons prescribed by the code (Id., §§ 221, 222) for the commencement of general actions. But the legislature, in enacting the special statute, not only saw fit to prescribe the contents of a complaint thereunder, but likewise the form and contents of the summons therein, making no reference to the general statutes relating to the commencement of actions. Clearly, we think, a summons in compliance with the special statute, served in accordance

with the statute, is sufficient to bring the parties defendant within the jurisdiction of the court.

It is next contended that the complaint fails to state facts sufficient to constitute a cause of action. If we have correctly gathered the appellants' contention on this branch of the case, the principal contention is that the allegations of the complaint charge a breach of the conditions of the lease which might warrant relief in a court of equitable cognizance, but state no facts which bring the cause within the statutes of unlawful detainer. But without following the argument in detail, we think no relief is sought which is not specially provided for by the statute. The substance of the charge is that the appellant North, after having obtained possession of the premises under a term lease containing a covenant not to assign or sublet, did assign and sublet the premises to the appellant Antill and others, in violation of the covenant. The statute in express terms authorizes relief for this specific breach. By subdivision four of § 812 (Rem. Code), a tenant of real property is guilty of unlawful detainer when he continues in possession in person or by subtenant after he fails to keep or perform any condition or covenant in the lease under which the property is held, "including any covenant not to assign or sublet" the premises, and by § 827 (Id.) it is provided that

"if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held . . . the judgment shall also declare the forfeiture of the lease, agreement or tenancy."

No relief beyond this is sought by the complaint.

Counsel further state:

"It is further observed that the lease does not advise that if an attempted assignment is made that the

lessor shall have a right of forfeiture or that such act would of itself work a forfeiture of the lease."

And argue that:

"Where there is a breach of the covenant not to assign, and there is no provision in the lease for re-entry or forfeiture, the assignment is not void but passes the term, and the lessor's only remedy is an action for breach of covenant."

We cannot so read the lease. Its language is this:

"This lease or any part hereof shall not be assigned by lessee or by operation of law, or otherwise, nor said premises or any part thereof sublet without the written consent of the lessors endorsed hereon; and in the event such written consent shall be so given, no other or subsequent assignment or assignments, or subletting, shall be made by such assignee or assignees or sub-lessee without previous consent of lessor first had and obtained in writing. If any rents above reserved, or any part thereof, shall be and remain unpaid when the same become due, or if lessee shall violate or default in any of the covenants, agreements, stipulations or conditions herein, then it shall be optional for the lessors to declare this lease forfeited and the said term ended and to re-enter said premises, with or without process of law, using such force as may be necessary to remove all persons or chattels therefrom, and the lessors shall not be liable for damages by reason of such re-entry or forfeiture; but notwithstanding such re-entry by the lessors the liability of the lessee for the rent provided for herein shall not be relinquished or extinguished for the balance of the term of this lease."

Clearly, there is here a provision of forfeiture for a breach of the covenant not to assign or sublet. But if the fact were otherwise, the result contended for, in view of the express provisions of the statutes before cited, would not follow. The statute expressly makes a breach of these covenants a ground for forfeiture, and the result would follow from the breach whether the lease provided for a forfeiture in terms or not.

The third assignment is that the court erred in the admission of the evidence of the witness Edith Hyder. She was questioned and permitted to answer concerning her relations with the property immediately prior and subsequent to the execution of the lease to appellant North. In substance her testimony was that she had been a former tenant of the property and, at the time of the lease to Mrs. North, was in possession of the property as a tenant and owned certain of the furniture then in the building; that she subsequently sold this furniture to persons other than Mrs. North, and continued in possession thereafter for a time under an agreement with the appellant Antill and accounted to him for the receipts of the operation of the apartment building thereon. The plaintiffs were permitted to resort to any legitimate testimony to prove the allegations of their complaint, and we think without question this evidence tended to show an assignment of the lease by Mrs. North.

The fourth objection is that the verdict and judgment is contrary to the evidence. This objection does not merit extended consideration. There was evidence which would warrant the jury in finding that the appellant North, shortly after the execution of the lease to her, made a written assignment of the lease without naming therein an assignee and delivered the assignment to the appellant Antill, and that she thereafter exercised no control over the premises. Manifestly, there is here evidence of a breach of the covenants of the lease. It is true, there was evidence tending to show that Antill in his relation to the transaction acted as the broker and agent of others. But he did not choose to disclose his principals, and under these circumstances he cannot complain that the jury visited upon him the penalties which, if he had been more frank, might have been rested upon others.

The remaining assignments question the correctness of the instructions of the court to the jury. In the main these objections are directed to instructions which could be incorrect only on the theory that the appellants' view of the tenor and purport of the statute is correct. These we have sufficiently answered in our discussion of other objections urged. Specifically, it is contended that the court erred in giving the following instructions:

"In considering whether an assignment has been made or the premises sublet the law looks to the substance, that is, to what the real transaction is, rather than to what the parties themselves may call it, and if the effect of what was done by Mrs. North places out of her hands the right to the possession of the property and gives to some other person the right to the possession and control thereof, then it would be an assignment or subletting within the meaning of the law and would be violative of the lease and subject it to forfeiture.

"A party may not do indirectly what he is prohibited from doing directly. The law looks to the effect, the result, and if the effect or the result is that of an assignment or subletting of the whole or a part of the lease, then it was in violation of the terms thereof.

"A subletting is not required under the law to be in any particular form. It need not be in writing and it occurs wherever a third person is permitted to take possession of the entire premises having the sole right of control thereof and the right to receive and keep the proceeds thereof, or to use and enjoy the same and the whole thereof. So I instruct you that if you find, from a preponderance of the evidence in this case, that Mrs. North did place in charge of third persons the entire premises mentioned in the complaint, who had the sole right to occupy and control the same without any direction from Mrs. North, and who had the right to and who did manage and conduct the same, either in person or by agents, receiving the rents and profits

thereof, and enjoying the use, possession and profits thereof, then I charge you, that such act would be a subletting in violation of the provision of said lease."

It is objected that these instructions permit the jury to find an assignment and subletting from circumstances shown, without direct evidence on the matters. Doubtless this is the effect of the instructions, but nevertheless we think them unobjectionable. The statute was intended as a remedy for an assignment and subletting in fact, whatever may be the form, and the instructions do no more than announce this principle.

We find no error in the record and the judgment will stand affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16112. Department Two. February 17, 1921.]

ANNA L. HUTCHINS, *as Guardian etc., Respondent,* v. SCHOOL DISTRICT NO. 81 OF SPOKANE COUNTY, *Appellant.*[1]

NEGLIGENCE (10, 38)—ACTS CONSTITUTING—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILDREN—EVIDENCE—SUFFICIENCY. The negligence of a school district in leaving an open pit on the school grounds unguarded is a question for the jury, where it was left open and unguarded for seven months, surrounded by loose boards calculated to tempt children in play.

SAME (22, 39)—CONTRIBUTORY NEGLIGENCE—CHILDREN—EVIDENCE—SUFFICIENCY. Contributory negligence, as a matter of law, is not shown by evidence that a boy ten years old was attempting to hop across a plank over an open pit on the school grounds, when he lost his balance, it appearing that he was answering a challenge and did as other boys had been doing.

PLEADING (104) — AMENDMENTS—TO CONFORM TO PROOF. It is not an abuse of discretion to permit a trial amendment to a complaint alleging negligence in maintaining an open pit on school grounds, to

[1]Reported in 195 Pac. 1020.

conform to proof that the place was attractive to children, which had been received without objection.

TRIAL (101)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse a requested instruction to the effect that a boy must use such care as a person of his capacity, age and experience could ordinarily use, where it was sufficiently covered by instructions defining contributory negligence, dependent upon his experience and age, and the care exercised by an ordinarily reasonable and prudent person under the circumstances.

DAMAGES (84)—EXCESSIVE DAMAGES—PERSONAL INJURIES—INJURY TO LEG OR FOOT. A verdict for $1,750 for injuries sustained by a boy ten years old, is not excessive where he sustained a broken tibia at the ankle joint and was permanently injured.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 27, 1920, upon the verdict of a jury, rendered in favor of plaintiff, in an action in tort. Affirmed.

Davis & Heil, for appellant.

E. R. Livesey and *John M. Gleeson,* for respondent.

MITCHELL, J.—This action was brought by Anna L. Hutchins as guardian *ad litem* for Dan W. Hutchins, a minor, as plaintiff, against School District No. 81 of Spokane county, Washington, as defendant, to recover damages for personal injuries to the minor alleged to have been caused by the negligence of the defendant. The defendant denied negligence on its part and further alleged contributory negligence on the part of the minor, which latter was denied by the plaintiff. A trial of the case to a jury resulted in a verdict and judgment for the plaintiff in the sum of $1,750, from which the school district has appealed.

The school district commenced work on an addition and in the making of repairs to one of its buildings known as the Holmes school, in the summer of 1918. In August of that year, through its superintendent of buildings and grounds, it dug a pit on the school

grounds for the purpose of changing the sewer connections of the building. The pit was dug nine feet deep and several feet across for the establishment of a manhole which was installed by the contractors some time after the happening of the accident complained of. The dirt from the excavation was thrown out on the sides. Debris, timber and lumber taken out of the building in making the repairs, estimated at about thirty wagon loads, were scattered from time to time near and around the pit. There was no notice or warning upon the premises, nor was there any guard rail, fence, or covering around or over the pit. This condition continued seven months, and until after the boy was hurt on March 25, 1919. It was situated on the play grounds that were always open and free to the school children. The school was for the minor grades and had been attended by this boy from the age of six until he was hurt, at which time he was nine years and seven months of age.

School commenced in the building as usual in September, 1918, and continued until some months after the accident. The school had an attendance of about five hundred boys and girls. On the day of the accident, March 25, 1919, the boy arrived at the building shortly before school opened and began playing with other boys about the pit. Some time previous to that day, a plank had been placed across the hole, the ends of the board resting on solid ground. There is no conflict in the evidence as to how the accident occurred. The boy was playing with others near the hole and one of the boys dared them to hop across on the board. His account of it is as follows:

"Q. That is the first time that you went on this plank you lost your balance and fell? A. Well, I had been across it once, I think. Q. That morning? A. No, the day before. Q. The day before. And up until

the day before had you played around this hole? A. Not very much. . . . Q. But you never went near this hole. Did any of the boys? A. Yes, lots of them did. Q. Why didn't you? A. Why, I was playing ball there most of the time. . . . Q. Do you recall who it was dared you to go on the plank? A. I don't remember. Q. Were any of the other boys crossing this plank? A. Yes, one boy got across before me, so I thought I could get across. Q. When this other boy went across the plank, did you hear it crack? A. No. Q. You didn't hear that. Why did you go across the plank? What was your purpose in going across there? A. Well, they dared me to and the other boy got across, so I thought I could. Q. You were not going across in order to get over to the other side of the ground, or anything like that? A. Yes. I didn't have any idea I was going to fall in. Q. Well, you were just going across the hole just playing, weren't you? A. Yes. Q. When you went on the plank were you walking or running or hopping or jumping or what? A. I was hopping. Q. You would get out to the middle of the plank and jump up and down. A. No, the board—I did not jump up and down. The board was springy. Q. Do you remember whether the board bent down quite a little in the middle at the time you were on the plank? A. Well, yes. Not very much, though. Q. And at this time you were hopping up and down? A. Yes. Q. Do you remember on which foot you were hopping? A. On my right foot. Q. You were hopping on the foot that was injured. A. Yes. Q. Did you see any of the other boys go across the plank? A. Yes. Q. And how did they go across it? A. They hopped across. Q. Hopped up and down. Would they go to the middle of the plank and hop up and down? A. Well, they hopped clear across. Q. Did any of them stop and jump into the hole? A. No. Q. And when they were jumping, where were you? A. Waiting my turn. Q. Your turn came? A. Yes. Q. You were standing up on the bank around the hole and watched them jumping, going across? A. Yes. Q. Could you tell the jury just in what way you fell off the plank or what caused you to fall? A. Well, I

overbalanced. Q. Did the plank tip? A. No. Q. Did the plank break? A. No. Q. Crack? A. No. Q. But you overbalanced? A. Yes. Q. You mean that when you were hopping up and down you hopped a little too far to one side or the other, and sort of missed the plank? A. Well, they yelled at me, and I hopped a little too far to one side. Q. And sort of lost the plank and fell down. How did you get out of this place? A. They had to drag me out."

The injury was to the right foot. There was a fracture of the tibia beginning about an inch above the end of the bone extending down through the cartilage at the end of the bone into the ankle joint. It caused intense pain for several days and nights. The boy was confined to the house for about four weeks, used crutches for about eight weeks, and then used a cane for a while. The testimony is ample to show that the boy received approved treatment and care, notwithstanding which it was apparent, at the time of the trial of the case about a year after the injury, that the foot was permanently injured.

It is argued by the appellant that its motion for a nonsuit was improperly denied, and also that its motion for a judgment n. o. v. should have been granted. The argument is based upon the assertions that there was no proof of negligence on the part of the school district and that the boy was guilty of contributory negligence. The accident happened on the play grounds of a public school teeming with hundreds of children of tender years. For seven months the pit was left open, without guard or barrier, surrounded by loose boards and timbers calculated to encourage and tempt the children in their pranks and ventures about the place, while and at the same time those same articles afforded to the school district the means, in a few moments of time, to have made the place almost or quite impossible of danger. In our view, upon the

question of whether the attractiveness of the dangerous place was such as to entice children, and at the same time such as to constantly suggest to the school district and its officers the reasonable probability of just such or a similar accident, there can be no room for an opinion other than that it was one for the jury. *Jorgenson v. Crane,* 86 Wash. 273, 150 Pac. 419, L. R. A. 1915 F 983.

As to the other point, the boy had the implied consent of the school district and the teachers, at least there had been no objection made in any manner, to engage in play over and about the pit. He had observed other small boys perform the same feat without mishap. His manner of attempting to execute the trick to which the boys had been challenged by other playmates was similar to that of those who preceded him. In the midst of the yells and commotion of his comrades, he lost his balance, fell, and was injured. Assume, as contended by the appellant and approved by the trial court, that the boy, of average mental capacity for one of his age, was not exempt from the charge of contributory negligence; still, it cannot be held, as a matter of law, that he acted with less care than an ordinarily reasonable and prudent child of his age would exercise under the same circumstances, surroundings and conditions.

At the close of respondent's case, her attorney moved the court that the complaint be amended in accordance with the testimony of the boy so as to allege that the place was an attractive one to children. The motion was granted over the objection of the appellant. This ruling together with the giving of certain instructions which in part cover this view of the case it is claimed was reversible error. It is not claimed, as we understand, the instructions were wrong if the ruling on the motion to amend the complaint was not erroneous. It

is doubtful if there was any necessity for the amendment, upon a consideration of the whole of the complaint. The name given to the effect such a place had upon the children is not so important as the ultimate facts which were already pleaded. Without question that portion of the testimony that encouraged the motion was the account given by the boy of the place, the circumstances, and of the injury, without any objections to his testimony, which was considerably amplified in this particular upon his cross-examination from which we have taken the history by the questions and answers hereinbefore set out. Upon granting the motion, no surprise was claimed nor continuance asked for by the appellant. The matter was within the discretion of the trial court, which was in no sense abused, while the instructions in relation thereto were proper.

In the instructions, the court clearly and fully defined contributory negligence and its effect, and pointed out that, in considering this defense, the jury should pass upon the question as to whether the boy appreciated the dangers to which he was subjected and that his appreciation would depend upon his intelligence and experience more than upon his age. It is admitted by the appellant that the instructions were good as far as they went, but that they failed to give the jury a standard by which to measure the conduct of the boy after considering his experience and intelligence. Accordingly, it is contended the court should have given in this connection an instruction requested by the appellant to the effect that, if the jury believed the boy did not use such care as a person of his capacity, age, and experience would have ordinarily used under the circumstances surrounding him at that time, and that such lack of care contributed to the injuries complained of, then he was guilty of contributory negligence and the verdict should be for the defendant. Counsel rely

upon the case of *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341, wherein the rule is stated to be that it is necessary for the jury to ascertain if the injured child made such use of its capacity to exercise care as the law required and that the instructions should furnish the rule by which that fact was to be determined.

The rule is a correct one and as a matter of fact was observed in the present case. In another paragraph of the instructions, the jury had been advised,

"A person is guilty of negligence when he fails to exercise ordinary and reasonable care; that is to say, such care as an ordinarily reasonable and prudent person would exercise under the same circumstances, surroundings and conditions."

This was as effective as the one refused as a guide by which to measure the conduct of the boy after considering his experience, age, and intelligence, considered with the definition of contributory negligence and its effect as contained in the other instructions referred to. The order of placing the instructions together, and the particular language to be used in properly expressing the rules, are at the choice of the trial court.

The argument made on the assignment that the trial court erred in denying a motion for a new trial presents the additional contention that the damages awarded are excessive. In addition to what has already been said as to the extent of the injuries, the record shows that the boy still suffers at times and especially at play, and that besides the injury to the bone and ankle joint, the foot is permanently injured also. That there is permanent injury is shown not only by the opinions of the surgeons but by the ascertainment and description by them of conditions that satisfy the layman of such injuries. Located as they are in the foot and at

the end of the bone in the ankle joint, we are satisfied the verdict is not excessive.

Judgment affirmed.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15980. Department Two. February 17, 1921.]

BARNEY SIMON, *Appellant*, v. ZELMA LEVY *et al.*, *Individually and as Administrators, Respondents.*[1]

PARTNERSHIP (14, 16)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the existence of a partnership where it appears that letters passing between the deceased, during his lifetime, and the appellant show that deceased and appellant were jointly interested in goods shipped from Alaska to Seattle for the purpose of opening and conducting a jobbing and retail mercantile business in Seattle.

SAME (10)—RELATIONS—PRESUMPTIONS. Where a partnership is shown, equal interest will be presumed in the absence of evidence as to the interest.

PARTNERSHIP (76)—DEATH—RIGHTS OF SURVIVOR—ADMINISTRATION OF PARTNERSHIP PROPERTY. The surviving partner is entitled to administration of the partnership property, if, within five days from the filing of the inventory, he apply for the administration thereof; and if he so applies, he shall be entitled to administer the partnership property if the court finds him to be qualified.

EXECUTORS AND ADMINISTRATORS (13)—QUALIFICATIONS OF ADMINISTRATOR—RESIDENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the residential qualification of a surviving partner to administer on partnership property where it is shown that, upon receipt of advice of the death of the deceased, the surviving partner immediately left Alaska for Seattle, shipped his household goods to Seattle and intended to make Seattle his home.

Appeal from a judgment of the superior court for King county, Allen, J., entered March 2, 1920, denying a petition for administration of partnership property, after a hearing on the merits. Reversed.

[1]Reported in 195 Pac. 1025.

Arthur C. Bannon and *Peters & Powell,* for appellant.

Walter B. Allen, for respondents.

MOUNT, J.—This appeal is from an order of the lower court denying the appellant the right to administer the partnership property belonging to appellant and his deceased brother. There are but two questions in the case: (1) Whether there was a partnership existing between the appellant and his deceased brother; (2) was the appellant disqualified by reason of nonresidence?

The facts are briefly as follows: The appellant and Louis Levy, during his lifetime, were full brothers. On January 14, 1919, Louis Levy died in the city of Seattle. At that time the appellant was in Anchorage, Alaska. He was notified of his brother's death and immediately left for Seattle. Pending his arrival, an agent in Seattle filed a petition praying that the appellant be appointed administrator of the partnership estate of the appellant and his deceased brother in Seattle. Upon the same day that Louis Levy died, Bernhard Levinson was appointed as special administrator to take charge of the property left by the deceased. Thereafter Mrs. Levy, the widow of the deceased, filed a petition praying that she and Mr. Levinson be appointed general administrators. They were so appointed.

Upon the hearing of the appellant for appointment as administrator of the partnership estate, the court denied the appointment. Upon the question of whether or not the property in possession of the deceased at the time of his death was partnership property, much evidence was introduced. This evidence consisted principally of letters written to and from the brothers during the lifetime of Mr. Levy. Upon hearing all

the evidence, the trial court was of the opinion that a large portion, if not all, of the property was partnership property, but that the interest of each partner in the property was not shown.

It appears that, prior to the year 1914, the two brothers had been in partnership in the general merchandise business at Fairbanks in Alaska. At that time there were written articles of co-partnership existing between the brothers. On July 15, 1914, Barney Simon, the appellant, sold his interest in the partnership business in Fairbanks to his brother, Louis Levy. Thereupon, Mr. Simon went to Anchorage and opened a general merchandise store on his own account while his brother continued the business at Fairbanks on his own account. There was no partnership existing at that time and the two businesses were operated separately. In the summer of 1918, Louis Levy shipped what goods he then had at Fairbanks to Seattle. The appellant shipped a large amount of goods from Anchorage to his brother in Seattle. All these goods were stored in Seattle. The letters passing between the two brothers show that they were jointly interested in the goods which were shipped both from Fairbanks and Anchorage to Seattle, and that these goods were shipped to Seattle for the purpose of opening and conducting a jobbing and retail mercantile business. The appellant at Anchorage was disposing of his stock and closing out his business there for the purpose of removing to Seattle and joining his brother Levy in the conduct of the Seattle business. He had shipped out from Anchorage to Seattle goods which he estimated at forty thousand dollars. He still had on hand at Anchorage goods which he estimated at eighteen thousand dollars which he was endeavoring to close out. It was agreed between the brothers that, shortly after the first of the year 1919, the appellant would come to

Seattle and assist his brother in conducting the business. He had also shipped a large quantity of his household goods from Anchorage to Seattle. Before he had closed out his business in Anchorage, he received the news of his brother's death, and immediately left Anchorage and came to Seattle.

The trial court, as we have above stated, was of the opinion that there was a co-partnership existing between the two brothers in the goods which had been shipped by each of them to Seattle at the time of the brother's death. We are satisfied upon the record that these goods were partnership goods and that the brothers had an agreement and understanding between themselves that they were to be used as partnership goods in the city of Seattle. Equal interests will be presumed without competent evidence to show different interests. 20 R. C. L. 1023.

The statute provides, at § 88, ch. 156 of the Laws of 1917, p. 664, as follows:

"The whole of the partnership property shall be administered by such executor or administrator, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof. If he so apply, he shall be entitled to administer the partnership property if the court find him to be qualified."

It is apparent from this provision of the statute that the surviving partner is entitled to preference to administer upon the partnership estate, provided he files his application within time. Appellant did so file in this case. So that the remaining question is, was the appellant qualified?

Upon this question the appellant testified as follows:

"Q. At the time you shipped these goods from either Anchorage or Fairbanks——. A. Anchorage.

Q. You shipped some of your household goods, didn't you? A. Yes. Q. You sent your little girl down here, too, didn't you? A. Yes, sir. Q. She is here now, is she? A. Yes. Q. It was your intention to reside in this city? A. Yes, sir. Q. It is now your intention to reside here? A. Yes, sir. Q. How much of your household goods are there here? A. Oh, there is mostly everything I had there. Q. Where is that stored? A. Stored in the warehouses. Q. In the same warehouse these goods are? A. Same warehouse, yes."

On cross-examination, he testified as follows:

"The statement that you made on oath in the former hearing that your home was in Fairbanks is true, is it not? A. No. Q. It is not true? A. My home was in Anchorage. Q. In Anchorage, I mean. A. Yes. Q. Your wife is in Anchorage? A. My wife is in Anchorage, yes."

And on redirect examination, he testified as follows:

"Q. You have considerable merchandise up there yet, haven't you—at Anchorage? A. Yes. Q. Which you are endeavoring to sell out? A. Yes. Q. Your wife is in charge of it? A. Yes. Q. It is *bona fide* your intention to reside in this city? A. Yes, sir. Q. And bring your wife here later? A. Yes, sir. Q. As soon as the stock is sold out. A. Yes. Q. (The Court) What is the status with respect to that stock of goods—are you replenishing the stock? A. Yes. Q. That is the same stock of goods you spoke of heretofore? A. Yes, sir."

We are satisfied that, under this evidence, the appellant was qualified to act as administrator of the partnership estate. The rule is stated in 19 C. J. 403, as follows:

"In the absence of any statutory regulation of the subject, no definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient, even if it is but for a day. Although a long-

continued residence in one place is often regarded as strong evidence or even a controlling circumstance in determining the question of domicile, residence alone, however long-continued, even for a period of years, will not alone effect a change of domicile, in absence of the requisite intention."

In the case of *McCord v. Rosene,* 39 Wash. 1, 80 Pac. 793, we said:

"And it is well established, as a matter of law, that a man's residence is not necessarily controlled by the residence of his family. . . . It is also well established that a man's domicile is determined by his actual residence, coupled with his intention to remain, irrespective of the residence of his family."

In the case of *In re Newman,* 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780, where the exact point now under discussion was passed upon, the court said:

"It is contended that petitioner was not a resident of California, and therefore was not entitled to letters. She testified that she came to this state because her husband left an estate here; that if he had not left such estate she would not have come, but that being here it was her intention to remain and make this her future home. The court found in her favor. Her intention constituted the material issue."

So in this case, it clearly appears from the evidence, without any dispute, that the appellant intended to remain in this state. He had shipped most of his household goods from Anchorage to Seattle. He had brought his little girl down here and announced his intention of coming to Seattle to conduct the business and declared his intention of remaining here. His wife was at Anchorage at that time, but she was left in possession of a small amount of goods which she was endeavoring to close out in order that the family might move to Seattle. It is true, the appellant testified that he was renewing his stock there but that, no doubt, was

for the purpose of more advantageously closing out the remnants of his depleted stock. We think it is plain, under the evidence, that he was, at the time of his application, a resident of this state and intended to remain here. We are of the opinion, therefore, that the trial court erred in refusing to appoint the appellant as administrator of the partnership estate.

The judgment is reversed and the cause remanded with directions to appoint the appellant administrator of the partnership estate.

HOLCOMB, MITCHELL, MAIN, and TOLMAN, JJ., concur.

[No. 15950. *En Banc.* February 19, 1921.]

S. L. CALDBICK *et al., Respondents,* v. MARYSVILLE WATER & POWER COMPANY *et al., Appellants.*[1]

WITNESSES (78)—CROSS-EXAMINATION—LIMITATION TO SUBJECT OF DIRECT EXAMINATION. Where one of the plaintiffs had testified on direct examination as to their ownership of land, cross-examination as to whether the property had not been sold under contract and as to price received therefor, is improper as not relating to the matter testified to on direct examination.

DAMAGES (112)—EVIDENCE—ADMISSIBILITY—DAMAGE TO PROPERTY FROM FLOODING. An offer of evidence to show that a responsible party undertook to rent property from respondent in 1919 after alleged damage had been done by flooding, is properly denied where the damages claimed are not for loss of crops for the year 1919 but for decrease in the market value of the property by reason of the flooding.

WATERS AND WATER COURSES (73, 74)—FLOWAGE—ISSUES—INSTRUCTIONS. Upon an issue as to damages to land from flooding resulting in a decrease of the market value of the property, instructions are properly refused, when based upon whether the material washed upon the property by the flood was a benefit or damage to the land.

SAME (72)—FLOWAGE — ACTIONS — QUESTION FOR JURY. Whether flowage from a reservoir resulting in damage to land was due to de-

[1]Reported in 195 Pac. 1027.

fendant's negligence, or an unprecedented rainfall, is a question for the jury, when the evidence on the question as a whole was in conflict.

DAMAGES (104, 124)—PLEADING, EVIDENCE AND ASSESSMENT—LIMITATION AS TO AMOUNT—INSTRUCTIONS. It is reversible error for the court to instruct the jury that the maximum sum to be allowed in an action for damages is the amount claimed in the pleadings without limiting such recovery to the maximum amount shown by the evidence, where the testimony shows the latter to be less than the amount specified in the pleadings.

PARKER, C. J., BRIDGES, FULLERTON, and TOLMAN, JJ., dissent.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered December 8, 1919, upon the verdict of a jury, rendered in favor of the plaintiffs, in an action for damages from flooding land. Reversed.

W. P. Bell and *Coleman & Fogarty,* for appellants.

Williams & Davis, for respondents.

MACKINTOSH, J.—Prior to January 23, 1919, the appellants had maintained and operated a reservoir near the ranch owned by the respondents, and according to the allegations of the complaint, on that day, by reason of the fact that the appellants had negligently and carelessly failed to keep the reservoir in repair, the water escaped therefrom and flooded the respondents' property and damaged it by leaving deposits of earth thereon, and by filling up and destroying ditches and flumes, by washing away sand and gravel, and by damaging the barn and filling an excavation with earth.

By affirmative defense, the appellants excused the escape of the water from the reservoir by alleging that the dam broke by reason of an unprecedented rainfall. The jury returned a verdict in favor of the respondents, and from a judgment based on that verdict, the appellants appeal.

Appellants allege as error, first, that, when the respondent Pauline O. Caldbick was on the stand as a witness for the respondents, the appellants were denied the right, on cross-examination, to ask her in regard to a sale which the respondents had made of the property in question. The witness had been placed on the stand by the respondents for the purpose of proving the ownership of the property, and her direct examination was confined solely to that question. It was not proper cross-examination for the appellants to attempt to prove by her that the property had been sold under contract, and the price for which it had been thus sold. If this evidence were proper at all, it would have to be proved as any other matter in the appellants' case, and if no other source of proof existed, appellants could have called the respondent as an adverse party and interrogated her in regard thereto. But the fact that the respondent was a witness did not alter the rule as to the limit of cross-examination allowed the appellants; the matter about which she was sought to be questioned was not a matter relating to that being investigated by the direct examination.

Second, the court refused to allow the appellants to prove that a responsible party undertook to rent the property from the respondents for the year 1919. The appellants claim that this was competent to show in mitigation of damages. The respondents, however, were not claiming damages by reason of any loss of crops for the year 1919, but were basing their claim for damages upon the decrease in the market value of the property by reason of the flooding. The testimony offered had no bearing upon the issue presented to the jury.

Third, the court was requested to instruct the jury that, if they found from a preponderance of the evidence that the flood was caused by the negligence of

the appellants and not by an unprecedented rainfall, and that the material washed upon the respondents' property was a benefit to the property, and that the material so washed upon it did not injure the property, the respondents would then be entitled to recover only the excess of the damage to the property over the benefit to the same; and that, if the benefit was greater than the damage, appellants were entitled to a verdict in their favor. The theory upon which the case was tried, aside from the special items of damage, was that the flood had resulted in a decrease of the market value of the property, and the instruction offered was improper upon that issue. *Texas & P. R. Co. v. O'Mahoney,* 24 Tex. Civ. App. 631, 60 S. W. 902; *Gulf, C. & S. F. R. Co. v. Harbison,* 99 Tex. 536, 90 S. W. 1097.

Fourth, it is argued that the trial court was in error in not granting a judgment notwithstanding the verdict, based upon the assertion that the testimony shows that the escape of the water was due to an unprecedented rainfall. Reliance is placed on *Anderson v. Rucker Bros.,* 107 Wash. 595, 183 Pac. 70, 186 Pac. 293. The testimony in the case, however, leaves the cause of the flood in dispute. The witness who testified from the records of the United States' weather bureau showed that, in the vicinity of this property, there had been, on several occasions, rainfalls in excess of the rainfall on, and immediately prior to, January 23, 1919. The appellants' employee in charge of the reservoir, when he was first upon the stand, testified "it was a heavy rain"; though, when he was recalled to the stand, he testified that the rain of January 23d and the two days prior thereto was unprecedented in that section of the country. The testimony, as a whole, on this question was conflicting and was properly submitted to the jury.

Fifth, the court instructed the jury as follows:

"You are instructed that, if you find for the plaintiffs, under these instructions, you should allow such damages as the preponderance of the evidence shows they have sustained by reason of the flooding of the premises in question, and in fixing such damages you should consider the following items:

"(1) The reasonable cost of repair of the foundations of the barn on said premises, and the reasonable cost of cleaning out the excavation for said barn, if any, not to exceed the sum of five hundred dollars ($500).

"(2) The reasonable cost of repairing the injuries to the ditches on said farm, if any, made necessary by the flooding of the premises, and the reasonable cost of cleaning out said ditches on said premises so as to place said ditches in the same condition they were before the flooding of said premises, not to exceed the sum of one thousand dollars ($1,000)."

The appellants claim that this instruction is erroneous for the reason that the only witness testifying as to the items embraced in subdivision one of the instruction regarding the cleaning out of the excavation and the repair of the barn and foundations, testified that the sum of $397.90 would repair those conditions; and that the only witness testifying as to the item covered in the second subdivision of the instruction testified that the sum of $200 would repair the injuries to, and clean out, the ditches, and that the court should have limited, in its instructions, the amounts which the respondents could recover in regard to those two items to the amounts testified to by these witnesses.

It is true that in the introductory portion of the instruction the court told the jury that they must return a verdict according to the preponderance of the evidence, but it then proceeded to specifically call to the jury's attention the two items of damage and referred

to the amounts as they were set forth in the complaint, but not as they were established by the evidence.

We have held in personal injury cases that, where the court refers to the amount claimed by the complaint, such an instruction does not express the court's opinion that the amount of the verdict should be limited only by the amount claimed. In *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Cole v. Seattle, R. etc. R. Co.*, 42 Wash. 462, 85 Pac. 3, and *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400, we have held that the court was in error in having submitted to the jury instructions as to items claimed in the complaint upon which no evidence had been introduced. In *Crandall v. Puget Sound T., L. & P. Co.*, 77 Wash. 37, 137 Pac. 319, we held it was error for the court to instruct in regard to an item upon which no evidence had been introduced and upon another item which by stipulation had been reduced from the amount claimed in the complaint. The stipulation in the *Crandall* case amounted to a reduction of the plaintiff's demand to the amount stipulated, and the trial court was manifestly in error in having given the jury an instruction based upon the amount alleged, when it should have construed the pleadings as having been amended to set forth the reduced amount stipulated.

The testimony in the case before us, having been uncontradicted, had very much the same effect as the stipulation in the *Crandall* case, and the court should have instructed the jury that, in taking into consideration the special items of damage, they should not return a verdict for respondents in an amount greater than the amount which had been testified to. It is argued that, to compel the court to give such an instruction, would necessitate the court's keeping watch over the testimony of the many witnesses who might be introduced in the trial of a case and who might testify

to different amounts based upon different methods of calculation, and would necessitate the court's determining what the maximum amount testified to was upon any item, and instructing the jury that a verdict should not be returned in excess of that amount.

The answer to this argument is obvious. All that would be necessary for the court to do in such a case would be to instruct the jury that, as to each certain item, they should not return a verdict in an amount in excess of the amount testified to by any witness, and that, if any of the testimony was in excess of the amount claimed in the complaint, the jury's verdict, as it related to that item, should be limited to the amount claimed in the complaint.

This question has been squarely presented and determined in the cases of *Morris v. Williford,* 70 S. W. (Tex. Civ. App.) 228, and *Emerson-Brantingham Imp. Co. v. England,* 186 S. W. (Mo. App.) 1181, and *Miller v. Kansas City W. R. Co.,* 180 Mo. App. 371, 168 S. W. 336, where the rule has been announced that the instruction must be within the purview of both the pleadings and the evidence, and that an instruction was erroneous which failed to limit the recovery to the loss shown by the evidence.

In the case of *Emerson-Brantingham Imp. Co. v. England, supra,* the testimony showed that, upon one of the items for which recovery was being sought, the damage would have been less than one hundred dollars, but the court said:

"Irrespective of this condition of the testimony, the jury was instructed, at the request of defendants, that: 'If they sustained any substantial loss during the threshing seasons of 1912 and 1913 by reason of said machinery not fulfilling the warranty (if you find that it failed to fulfill the warranty), then you will find for the defendant on their counterclaim in such sums as you may believe defendants so lost during said thresh-

ing seasons of 1912 and 1913, not to exceed, however, the sum of $1,300.' This instruction is fatally defective, in view of the testimony, in not limiting the damages to the elements which the jury were authorized to consider. . . ."

In the case of *Miller v. Kansas City W. R. Co., supra,* the jury were instructed that they should "assess the plaintiff's damages at such sum, as in the judgment of the jury, under all the evidence in the case, will compensate him for the injuries received, not exceeding, however, the sum of $25,000." In the plaintiff's complaint, the sum of two hundred dollars was alleged to have been expended for medicine, nursing and medical attention, and was included in the total claim of twenty-five thousand dollars. At the trial, however, the evidence showed the expense of medicine, nursing and medical attention was only fifteen dollars. The court said:

"We think the most reasonable view to take of it is that the instruction is so worded as to allow the jury to consider the entire $200 claimed for medical service when only fifteen dollars was proven. The instruction reads that the jury may allow such damages 'under all the evidence in the case', as will compensate plaintiff for the injuries received, not exceeding $25,000. This, in effect, told the jury they might allow the full $25,000 claimed, for it took that sum to make up the $25,000 asked."

In the case of *Morris v. Williford, supra,* the evidence showed that, on one item of damage, the damage amounted to twenty-six dollars, and on another item of damage, one hundred dollars. According to the allegations of the complaint, the sum of one hundred and ninety-three dollars was asked for these two items. The court said:

"Had he been entitled to recover for the above amounts as actual damages, he could only have re-

covered $126 therefor. The court charged the jury that they could not find for more than $193 actual damages, which was the amount stated in the petition. The charge was calculated to mislead the jury into the belief that they could find as much as $193 actual damages, when, under the evidence as above set out, only $126 was shown."

The rule in a great many jurisdictions is that it is error to state to the jury the amount of damages claimed by the plaintiff, but the weight of authority seems to be that it is not reversible error for the trial court to instruct the jury that they cannot award damages in excess of the amount claimed in the pleading, provided that there is no suggestion thereby made that that represents the amount of damages that the evidence warrants, and the jury are not influenced by the reference to the amount of the plaintiff's claim. But if the reference to the *ad damnum* appears to have been made in such a manner as to influence the jury, such reference is ground for reversing the judgment.

This rule, which meets the favor of this court, has been announced, so far as we have been able to discover, only in personal injury cases; but we see no reason why a jury should be allowed, in any case where the evidence does not conform to the amount alleged in the complaint, to receive an instruction which limits the maximum amount of their verdict to the amount not testified to by any witness. The rule should be that, where the evidence is clear and undisputed as to the amount of the damage, the court should instruct the jury that their verdict should not be in excess of that amount; where there are different amounts testified to, the verdict should not be in excess of the maximum amount testified to; and that, where different amounts have been testified to, some

of them in excess of the amount claimed in the complaint, the verdict should be in an amount not exceeding that claimed in the complaint. All these instructions, of course, to accord with the general instruction that the verdict should be based only on the evidence in the case.

We conclude, therefore, that it was error for the court to have given the instruction complained of; for by that instruction the jury were permitted to return a verdict upon item numbered one for one hundred and two dollars and ten cents in excess of any testimony, and upon item number two in the excess sum of eight hundred dollars.

The order of the court will therefore be that, if the respondents will, within twenty days after the cause is remanded, consent in writing to take a judgment for the amount of the verdict, less nine hundred and two dollars and ten cents, then a new judgment shall be entered in their favor for that sum; otherwise, the trial court is instructed to grant the appellants a new trial.

HOLCOMB, MAIN, MOUNT, and MITCHELL, JJ., concur.

BRIDGES, J. (dissenting) — I think the judgment should be affirmed. It has always been held by this court that it is proper for the court to instruct the jury that the verdict cannot exceed the amount stated in the complaint. In the case of *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091, Judge Dunbar, in speaking of such an instruction, said that:

"It was a simple statement as to the limitation of recovery under the complaint, and an instruction that is not only proper, but necessary, to be given to the jury in all cases of this character."

In the case of *Cole v. Seattle, R. etc. R. Co.*, 42 Wash. 462, 85 Pac. 3, the identical question we are now discussing was raised and decided. There the court instructed the jury that they might, if the evidence warranted, allow damages for medical services incurred by the plaintiff in an amount not exceeding one hundred dollars. Exception to this instruction was taken because there was no evidence showing damages in this regard in an amount in excess of seventy dollars. The court said:

"As we understand appellant's contention, it insists that these instructions were an intimation or suggestion to the jury that there was evidence sufficient to warrant a finding of $100 for medical services . . . We do not think the instructions were improper or susceptible of any such construction. In his complaint respondent alleged damages for medical services incurred in the sum of $100 . . . and all the court did was to limit the recovery to the amounts alleged, without any suggestion as to any sum which the evidence authorized or that should be allowed."

Nor do I agree with the majority opinion that the case of *Crandall v. Puget Sound T., L. & P. Co.*, 77 Wash. 37, 137 Pac. 319, lays down any contrary rule. The instruction there involved did not caution the jury, as the one here did, that it could in no event find for an amount in excess of that shown by the testimony.

The instruction here simply told the jury that they might find for the plaintiff in such amount as was shown by the testimony, not exceeding, however, the amounts alleged in the complaint, to wit, five hundred dollars on account of the barn and one thousand dollars on account of the ditches.

I believe it is the common practice of trial courts in this state to give instructions of this kind. To require those courts at all times to keep in mind the details of all the testimony and instruct the jury, at

its peril, as to the maximum amount of recovery testified to by any and all the witnesses, is, in my judgment, to impose on them unnecessary burdens in the performance of which many reversible errors will be committed. But the opinion of the court answers this argument by saying that, under such circumstances, all the court need do is "to instruct the jury that, as to each certain item, they should not return a verdict in an amount in excess of the amount testified to by any witness," and in no event more than is demanded by the complaint. This is exactly what was done by the court in this instance, for it instructed that the amount of the verdict must be controlled by the testimony, and that must, of course, mean that the verdict must not exceed the highest estimate given by any witness. If the trial court had not told the jury that their verdict must be within the testimony, then the objection would have been well taken.

I think the cases cited by the court in support of its views are, for the most part, distinguishable from the case at bar. For illustration, the instruction in the case of *Emerson-Brantingham Imp. Co. v. England, supra,* was held erroneous, "in not limiting the damages to the elements which the jury were authorized to consider." In the *Morris v. Williford* case, *supra,* the court told the jury that they could not return a verdict for more than one hundred ninety-three dollars, the amount sued for, when the evidence showed a damage of only one hundred twenty-six dollars. But it does not appear that the instruction gave the jury to understand that, in any event, it was to give no greater damage than that shown by the evidence.

I think the instruction given in this case was proper and that the judgment should be affirmed.

PARKER, C. J., FULLERTON, and TOLMAN, JJ., concur with BRIDGES, J.

[No. 16168. Department One. February 19, 1921.]

ELIZABETH BECK *et al.*, *Appellants*, v. CARRIE R. BOUCHER *et al.*, *Respondents.*[1]

PARTITION (17)—INCIDENTAL RELIEF. In an action for partition, in passing upon a claim to the land, the court may determine a claim for legal and professional services rendered to the claimant, and give full and complete relief to all parties to the controversy.

ATTORNEY AND CLIENT (41)—CONTRACTS FOR COMPENSATION—CONTINGENT FEES—VALIDITY. An agreement for contingent attorney's fees, which was solicited, contrary to our code of ethics, Rem. Code, § 2370, entered into without fraud or misrepresentations, is not therefore void as against public policy, in view of Id., § 474, leaving the measure or amount of attorney's fees to the agreement of the parties.

ESTOPPEL (52, 53)—EQUITABLE ESTOPPEL—ACCEPTANCE OF BENEFITS—CONTRACTS. A client who permits an attorney to spend time and money under a contract for a contingent fee and accepts the benefits of the contract is estopped to assert its invalidity on the ground that it was solicited and against public policy.

ATTORNEY AND CLIENT (40)—CONTRACTS FOR COMPENSATION—CONSTRUCTION AND OPERATION. An attorney's contract for twenty per cent of the share of an estate that might be recovered through litigation or otherwise, covers both real and personal property.

SAME (43-44-1)—COMPENSATION—ACTIONS—JUDGMENT. When, in an action for partition, a client repudiated her contract with an attorney to pay him twenty per cent of the share of the estate recovered, the attorney is entitled to personal judgment for the contract amount, and to have the same impressed upon her interest in the real estate.

Cross-appeals from a judgment of the superior court for Pierce county, Card, J., entered February 26, 1920, upon findings in favor of the defendants, in an action for partition. Affirmed on plaintiffs' appeal and reversed on defendants' cross-appeal.

O. S. Galbreath, for appellants.

Henry Arnold Peterson, for respondents.

[1]Reported in 195 Pac. 996.

HOLCOMB, J.—This action was brought by appellants, as plaintiffs, against the respondents, as defendants, to partition lands acquired by appellants and respondent Carrie R. Boucher by inheritance, and bringing in the other defendants as parties who claimed and asserted adverse interests. The land originally was the property of one John W. Roberts, who died intestate in Pierce county, Washington, on May 12, 1912, and whose estate was duly probated in the superior court for that county, and the lands here in question distributed as follows: One-fourth each to Elizabeth Beck and Catherine Rossiter, nieces, and one-half to George W. Roberts, a brother of deceased, who has since died.

Shortly after the death of John W. Roberts, and in June, 1912, George W. Roberts filed a petition in the superior court for Pierce county, for letters of administration upon his estate, claiming that he, George W. Roberts, was the sole and only heir, which claim of sole heirship was called to the attention of Elizabeth Beck, who afterwards entered into a contract with B. A. Knight, whereby Knight was to obtain for Mrs. Beck her share of the property left by the deceased Roberts, and in consideration for such services as Knight would perform in so acquiring her estate, she agreed as follows:

"Elizabeth Beck hereby employs said attorney B. A. Knight to assist her in obtaining for her her alleged share as an heir in the estate of John W. Roberts, deceased, of Tacoma, Washington, and agrees to pay said attorney B. A. Knight for such services twenty per cent (20%) of the share that may be found to belong to said Elizabeth Beck through litigation or otherwise in full payment for such services and expenses incurred in connection therewith.

"It is agreed on the part of said attorney B. A. Knight that he will faithfully undertake to obtain for

said Elizabeth Beck her share, if any, in the said estate of John W. Roberts, deceased, of Tacoma, Washington, and in the prosecution of said claim will advance his own traveling expenses and all expenses incurred thereby.

"It is further agreed on the part of attorney B. A. Knight that he will accept from said Elizabeth Beck twenty per cent (20%) of the moneys obtained for said Elizabeth Beck from the estate of John W. Roberts, deceased, same to be in full settlement of all attorneys fees and all costs and expenses incurred in the prosecution of the said claim of said Elizabeth Beck as an heir of said John W. Roberts, deceased.

"It is mutually understood and agreed by and between the parties hereto that this contract is to supercede and end all contracts heretofore made between the parties hereto concerning the subject matter herein involved."

The foregoing agreement was dated June 4, 1913. On June 30, 1914, Mrs. Beck attempted to revoke the foregoing contract, which revocation was not recognized by Mr. Knight.

On February 25, 1914, Mr. Knight, having received Mrs. Beck's distributive share of the personal property of the Roberts' estate, eighty per cent thereof was delivered to her, and the remaining twenty per cent retained by Mr. Knight, in accordance with the above quoted agreement. The real estate was not divided but went to the heirs as tenants in common according to their several interests therein.

On April 3, 1916, Mrs. Beck did in fact execute a deed of conveyance to Knight covering an undivided one-fifth interest of the real estate inherited by her from John W. Roberts, but such deed was not delivered to Knight, but was left with William T. Laube, her attorney.

Without recognizing any right of Knight to any portion of the real estate involved herein, Mrs. Beck, with

others, in September, 1918, commenced the partition proceedings for the setting apart to each of the heirs of John W. Roberts of his portion of the real estate, and making B. A. Knight and "Jane Doe" Knight, his wife, parties defendant, which action finally went to trial on the third amended complaint of plaintiffs, an amended answer and cross-complaint of defendants, and a reply thereto of plaintiffs.

On March 14, 1918, Elizabeth Beck had transferred all of her interest in the lands involved to her children, Louis E. Beck, Harry A. Beck, and Alice Bishop, by quitclaim deed, ignoring the claim of interest therein of Knight.

The third amended complaint alleges that Knight claims some interest in the real estate, but that the basis of his claim is unknown to plaintiffs, and prays for the distribution of the estate. By his amended answer and cross-complaint, Knight pleads the contract hereinbefore quoted from, and claims title to one-fifth of Mrs. Beck's original share of the real estate, and alleges that the sale by Mrs. Beck of all of her interest in the estate to her children was fraudulent and void. Plaintiff's reply to the amended answer and cross-complaint of the defendants admits the signature of Mrs. Beck to the contract pleaded in the answer and cross-complaint, but denies that it was intended to or did convey any interest in the real estate; that the deed to the children was not fraudulent; that the contract pleaded in the answer and cross-complaint was obtained through misrepresentation on the part of Knight; and alleges that Elizabeth Beck revoked the contract and that Knight agreed thereto.

The plaintiff moved for judgment on the pleadings, which motion was denied by the trial judge. Trial of the cause on the merits resulted in a decree as follows:

"That the said B. A. Knight and Jane Doe Knight, his wife, are not, nor is either of them, the owner or owners of any right, title or interest in and to the lands herein sought to be partitioned, and they have not, nor has either of them, any right, title or interest therein, save and except such as they or either of them acquire or may acquire by reason of this decree and judgment as hereinafter set forth.

"It is further ordered, adjudged and decreed that that certain contract made and executed on the 14th day of June, 1913, by and between B. A. Knight and Elizabeth Beck providing for the performance of legal and professional services, be and the same hereby is declared to be invalid and unenforcible.

"It is hereby further ordered, adjudged and decreed that B. A. Knight have and recover against the said Elizabeth Beck the sum of $1,273.64, and judgment is hereby awarded against Elizabeth Beck and in favor of B. A. Knight in said sum."

It was further decreed that the deed of conveyance from Elizabeth Beck, conveying to the grantees Louis E. Beck, Harry A. Beck and Alice Bishop all of her right and title in the lands here in controversy, which deed bears date the 2d day of April, 1917, is fraudulent and void and of no legal effect whatsoever and constitutes no encumbrance of any kind or character as against the decree and judgment rendered in favor of B. A. Knight and against Elizabeth Beck. It was also held in the decree that the certain agreement referred to in the deed of conveyance as having been executed of even date therewith was fraudulent and void and of no legal effect whatsoever, and constituted no encumbrance as against the decree and judgment in favor of B. A. Knight; and that B. A. Knight recover his costs and disbursements.

From that portion of the above decree awarding a money judgment in the sum of $1,273.64 to B. A. Knight, the awarding of costs and disbursements to

B. A. Knight, and declaring void the deed from Elizabeth Beck to her children, the plaintiffs have appealed. From that portion of the decree holding that Knight and wife had no interest in the property to be partitioned, that the contracts of employment were void and unenforcible, that Mr. Knight was entitled to a money judgment on *quantum meruit* against Elizabeth Beck in the sum of $1,273.64 only, the defendants have appealed.

A contract had previously been entered into between Mrs. Beck and Knight on June 20, 1912, whereby Knight was to obtain Mrs. Beck's inheritance in the estate of John W. Roberts, for thirty-three and one-third per cent thereof. Services under this contract continued until December, 1912, when Mrs. Beck sought to revoke the contract for the reasons, as stated by her, that she was of the opinion that Mr. Knight was working for a Mrs. Snyder while at the same time having a contract with Mrs. Beck. The Mrs. Snyder referred to had originally brought the parties together, and Mrs. Beck had made the contract in Mr. Knight's office in the presence of Mrs. Snyder, after having been introduced to him by Mrs. Snyder, who had read a notice of the death of John W. Roberts in a paper. The same Mrs. Snyder afterwards attempted to establish a claim of her own as a pretended grand-daughter of John W. Roberts, deceased. The attempted revocation by Mrs. Beck went unrecognized by Knight, who continued to perform the duties of attorney for Mrs. Beck under the original contract.

On June 3, 1913, Mrs. Beck wrote to Knight a letter in which she stated that, as Knight had agreed to throw off ten per cent of his contract price for fees and expenses, if he was willing to draw a new contract to that effect, to let her know by return mail. Mrs. Beck had employed a firm of attorneys by the name of

Harper & McMynn to advise her in the matter, who advised her that Knight had rendered her valuable services and was entitled to his contract. Mr. Knight, however, met Mrs. Beck's request by agreeing not only to throw off ten per cent, but to reduce his compensation thirty-three and one-third per cent, making the second contract twenty per cent of the amount of the estate recovered. The new contract being the contract set forth in the early part of this opinion, was therefore drawn up, and was executed by Mrs. Beck. Mrs. Beck admitted that the second contract was entered into by her after she had received the advice of attorneys Harper & McMynn, and of her brother-in-law, Mr. Rossiter, whose wife was also her sister and one of the heirs of Roberts and of her son.

The court found that the second contract, dated June 4, 1913, was made at the special instance and request of Mrs. Beck, and was executed by her and by Knight; that prior thereto on about June 20, 1912, they had made and entered into a certain contract for specific legal services to be performed for Mrs. Beck by Knight, which contract was substantially alike in terms to that above referred to, except that the contingent percentage to be paid Knight as compensation for his services was therein fixed at thirty-three and one-third per cent instead of twenty per cent as provided for in the second contract; that the first contract of employment was solicited by Knight from Mrs. Beck, thus being contrary to the code of legal ethics of Washington, and contrary to the laws of Washington (Rem. Code, § 2370); and therefore that the first contract was invalid and unenforcible; that, while the second contract, dated June 4, 1913, above referred to, was executed at the instance of Elizabeth Beck, the services thereunder were substantially a continuation of the legal services begun under the first contract, and

therefore the last contract is likewise invalid and unenforcible, and no recovery can be had thereon.

The court also found, upon the almost uncontroverted evidence, that Knight did not conceal from, nor in any manner misrepresent, any facts to Mrs. Beck, nor was any fraud or deception practiced upon Mrs. Beck, or in the making of the contracts or either of them, nor in connection with the services thereunder.

The court correctly proceeded upon the theory that an action for the partition of land is equitable in its nature, and in passing upon a claim to any or all of the land sought to be partitioned, the court would hear and consider all the evidence bearing upon the claim, if any, against Mrs. Beck for legal and professional services rendered her; and having assumed jurisdiction over the subject of the controversy and the parties thereto, and the interests of the parties requiring final disposition of the controversy, arrive at and grant full and complete relief whether legal or equitable. And the trial of the cause having proceeded upon that theory, the court made its findings and conclusions and decree that the appellants had fraudulently conveyed the land; that Knight could not enforce his written contract; but that he had rendered valuable services for which he was entitled to receive the amount adjudged.

It will be observed that the court conceived that the contract between Knight and Mrs. Beck was illegal because the employment had been solicited. It is true that our statute, Rem. Code, § 2370, forbids the solicitation of employment by an attorney in any suit pending or prospective, and the code of ethics of the American Bar Association, adopted as the statutory code of ethics of this state, also denounces the solicitation of business by an attorney, unless the personal relations so warrant; but assuming that the original contract

was tainted with illegality, after Mrs. Beck had attempted to revoke the original contract, she allowed the attorney to proceed for six months and then entered into a new contract for a new rate of compensation; allowed him to proceed until the matter had been finally determined in her favor by and through the services of the attorney with whom she made both contracts. We have another statute, § 474, Rem. Code, which provides that the measure or amount of compensation of attorneys and counsellors shall be left to agreement, expressed or implied, of the parties.

Although an attorney may be disbarred, under the statutory code of ethics, for soliciting business in this state, or may be prosecuted for barratry for soliciting business, it is not against public policy for the parties, when they get together and agree, without fraud, deception, or misrepresentation on the part of the attorney, as was found by the court and abundantly established by the record, to make a contract in writing determining the compensation to be received by the attorney. On the contrary, it is supported by public policy. It is true that such contracts will be scrutinized by the courts on the grounds of public policy because of the greater ability and learning of the attorney, and the fiduciary character of the relations; but where they have, at arm's length, arrived at a contract, and the contract has been acted upon and fully performed, and the client has received full benefit to be derived from the contract, we see no reason for penalizing the attorney by taking away from him a part of the compensation agreed upon between him and his client, with full knowledge of the facts, unless the compensation agreed upon is wantonly excessive. That is not the case here. The evidence here is that the services performed by Knight were very voluminous, and that he skillfully and ably performed them, and that he was

loyal in every respect to the interests of his client, and no criticism whatever could be found against his professional conduct in the matter entrusted to him.

The validity of a contract or retainer in whatsoever form or howsoever effected, whether sought by client or lawyer, is determined by the same rules of law as other contracts; and having the mutual assent of the parties, it withstands impeachment, unless unlawful,—i. e., (1) contrary to the positive law; (2) contrary to positive morality; (3) contrary to public policy. Weeks, Attorneys at Law, § 364.

As heretofore observed, this contract cannot be held impeachable under any of these standards, at least as to the second contract. The "clean hands," invoked by a far cry to excuse appellants from the payment of their lawful debt, can have no application unless respondents' contracts with their clients have defrauded them. Snell, Equity, 38, 39; 1 Pomeroy, Equity Jur. (4th ed.), § 400.

We may also consider that Mrs. Beck, under the record in this case, is estopped to deny the validity of the contract by reason of her having accepted all the benefits of the contract and having retained Knight as her attorney to secure for her all the benefits of the contract without objecting to its validity, and of having recognized the validity of the contract by making the quitclaim deed to the one-fifth interest in the real estate acquired for her by Knight, even though that quitclaim deed was not delivered.

The court found, largely upon the testimony of Mr. William T. Laube, an attorney who had for a time represented Mrs. Beck, that the only consideration for the execution of the deed was the settlement of Knight's claim against Mrs. Beck, and that the same was left with her attorney Laube to be used only in the event of a certain proposed partition being consummated. That

deed gave to Knight a one-fifth interest in the real estate, which was what he claimed.

The conduct of Mrs. Beck in acquiescing in the further proceedings by her attorney, Knight, and in his spending his money and labor in procuring an adjudication of her interests which resulted in every way favorable for her, certainly ought to estop her. *Adams v. Schmidtt,* 68 N. J. Eq. 168, 60 Atl. 345.

We therefore conclude that the trial court erred in holding that the contract of Knight and Mrs. Beck was invalid and unenforcible, and that his services were not to be measured by the contract.

It remains only to construe the contract. The contract provided that Mrs. Beck employed the attorney, Knight, to assist her in obtaining for her her alleged share as an heir of the estate of John W. Roberts, deceased, for which she agreed to pay her attorney, Knight, for such services twenty per cent of the share that may be found to belong to Mrs. Beck, through litigation or otherwise, in full payment for such services and expenses incurred in connection therewith.

Appellants contend that the contract only contemplated the payment of twenty per cent of the moneys and personal property which might be recovered for Mrs. Beck, and that of the moneys and personal property distributed Knight had received his full share. It seems to us too plain for argument that the contract provided for the payment of twenty per cent of whatever share may be found to belong to Mrs. Beck, through litigation or otherwise, whether real, personal or mixed of the estate of John W. Roberts. It is plain and unambiguous. It speaks for itself. The contract being valid and enforcible, the compensation to be awarded Knight is that provided for in the contract, and that is twenty per cent of the entire estate recovered for Mrs. Beck.

Appellants contend, however, that in any event Knight is not entitled to personal judgment for the sum of his attorney's fees against Mrs. Beck, or her interest in the estate. We think this position is untenable. She having repudiated the contract and attempted to get the subject-matter out of her name, Knight is entitled to a judgment for the amount of his contract services, and that the sum be impressed upon her interest in the real estate and deducted from the proceeds thereof if sold.

It is true that, under the contract of employment as averred and proven, the attorney was to look to the proceeds alone for his compensation; and it will be conceded that, if the other party had recognized the agreement and was ready and willing to comply with its terms on her part, she might possibly be exempt from any personal liability. But it by no means follows that she can repudiate her obligations under the contract and refuse to permit the other party to share in the proceeds, and, notwithstanding, insist that defendant's only remedy is to comply with the strict terms of the contract on his part. By refusing to carry out the contract, she incurred a personal liability for such damages as Knight may have suffered by reason of such refusal; or, by her conduct in the matter, she furnished Knight an additional remedy of which he may avail himself if he so elects. *Hazeltine v. Brockway,* 26 Colo. 291, 57 Pac. 1077. So in this case, Knight has two kinds of relief: first, the right to actual performance on the part of Mrs. Beck by compelling her to deliver a conveyance of one-fifth of her interest in the real estate partitioned to her of the admitted value of twelve thousand dollars; or the right to compensation in money for the amount of his contract services remaining unpaid, to wit: the sum of two thousand four hundred dollars, by reason of the failure of Mrs. Beck to

deliver him such amount. *Brodek v. Farnum,* 11 Wash. 565, 40 Pac. 189; *Hanna v. Reeves,* 22 Wash. 6, 60 Pac. 62; *Lawrence v. Halverson,* 41 Wash. 534, 83 Pac. 889; *Womach v. Sandygren,* 96 Wash. 12, 164 Pac. 600.

The judgment is affirmed upon plaintiffs' appeal, reversed upon respondents' Knight and wife's cross-appeal, and remanded to the lower court with instructions to proceed in conformity with this opinion. Cross-appellants will recover all costs.

PARKER, C. J., FULLERTON, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16247. Department One. February 19, 1921.]

THE STATE OF WASHINGTON, *Respondent,* v. WALTER L. WALLACE, *Appellant.*[1]

CRIMINAL LAW (191)—CONTINUANCE—GROUNDS—DISCRETION. It is discretionary to deny a continuance in a criminal case for want of necessary witnesses, and not error where the affidavits did not sufficiently comply with Rem. Code, § 2135.

CRIMINAL LAW (444)—APPEAL—REVIEW—HARMLESS ERROR. Error in setting a case for trial without strict compliance with statutory requirements is cured by resetting the case for a later date.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered June 9, 1920, upon a trial and conviction of first degree assault. Affirmed.

Guy E. Kelly and *Thomas MacMahon,* for appellant.

J. W. Selden and *Rex S. Roudebush,* for respondent.

PER CURIAM.—The appellant, on February 19, 1920, was charged by information with the crime of assault in the first degree. On April 3, he filed a plea of not

[1]Reported in 195 Pac. 993.

guilty and an affirmative defense of insanity. On May 18, he was brought into court, informed that his attorneys had withdrawn from the case, and that the trial thereof would be set for May 24. He then got into communication with his present attorneys, who, before they would accept the defense, secured from the court the resetting of the case for May 28. On May 24, a motion was made for a further continuance. Accompanying the motion was an affidavit setting forth that the attorneys had not had sufficient time to prepare properly for the trial, and that material witnesses lived in Yakima whose addresses were not known, and that the case had been set for trial without notice to the defendant. The motion was denied. The case proceeded to trial; the defendant was convicted, and appeals, assigning two errors: first, that the court should have granted his motion for a continuance; and second, that the court was in error in setting the case for trial without notice.

The matter of granting a continuance is within the discretion of the court, and, as said in *State v. Conner*, 107 Wash. 571, 182 Pac. 602:

"The frequent abuse of the right to obtain a continuance has induced stricter vigilance by the courts to prevent such abuse. The very nature of the relief requested is such that the decision of the question necessarily rests almost entirely upon the discretion of the trial court, and we are not inclined to interfere with such discretion unless abused to the extent of prejudicing the applicant's right to a fair trial."

The affidavit accompanying the motion for continuance did not sufficiently comply with the requirements of the statute, Rem. Code, § 2135, to call for the court making an order other than that which it made. *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Vance*, 29 Wash. 435, 70 Pac. 34. An examination of the record

before us will not permit us to say that the appellant's right to a fair trial was prejudiced by the action of the superior court.

Upon the second error assigned, it is sufficient to say that, although it might be held that the setting of the case on May 18, was not in strict compliance with the statutory requirement, that informality was cured by the action of the court on the same day by resetting the case for May 28.

We find nothing in the record to reverse the judgment, which is therefore affirmed.

[No. 16290. Department One. February 19, 1921.]

THOMAS CARSTENS, *Respondent*, v. J. B. POWLES & COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER (30, 107)—CONSTRUCTION OF CONTRACT—PROVISION FOR PAYMENT OF TAXES. A contract for the sale of land providing that the "taxes, rents, insurance . . . shall be apportioned from date of deed," refers to taxes for the year in which the contract was made; and Rem. Code, § 9235, providing for a lien for unpaid taxes, as between grantor and grantee, in the absence of an agreement as to who shall pay the same, has no application.

Appeal from a judgment of the superior court for King county, Marion Edwards, Esq., Judge *pro tempore*, entered December 14, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

James Kiefer, for appellant.

Kerr, McCord & Ivey (*Wm. Z. Kerr*, of counsel), for respondent.

MACKINTOSH, J.—On October 4, 1920, the appellant, being the owner of a lot in the city of Seattle, agreed

[1]Reported in 195 Pac. 1017.

to sell it to the respondent, and the respondent agreed to purchase. At that time, an earnest money receipt was signed by both of the parties which, among other things, provided:

"Taxes, rents, insurance and interest on mortgage, if any, to be apportioned from date of deed. . . ."

It was stipulated by the parties that the word "deed" was erroneously used for "contract" by the scrivener drawing the earnest money receipt. It was in the contemplation of the parties that a formal contract should thereafter be entered into as soon as the appellant should furnish an abstract showing a marketable title, and on October 21, the contract contemplated by the earnest money receipt was executed, and the payment called for therein was made. The parties at that time could not agree as to the proper interpretation of the phrase in the receipt which we have quoted above.

It is the claim of the respondent that the word "taxes" had reference to the taxes for the year 1920, that is, those taxes beginning March 1, 1920, whereas the appellant claims there were no taxes. Notwithstanding this disagreement, the formal contract was executed, and the point in controversy between the parties was submitted to the court. When the earnest money receipt was given, the last half of the 1919 taxes had not been paid, and the appellant admits that these taxes, having been levied for the year ending February 29, 1920, were to be paid by him and are not the taxes referred to in the earnest money receipt. The only taxes to which the receipt could refer were for the year beginning March 1, 1920, and ending February 28, 1921. The rate, as related to taxes collectible in King county, was fixed on October 8, 1920, and not until that date the exact amount of the taxes for all

purposes upon the property could be determined. It is the appellant's contention that the earnest money receipt cannot refer to the 1920 taxes as the exact amount thereof had not been ascertained on October 4.

The case of *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667, referred to by the appellant, does not discuss the question before us for the reason that the court there held that the state, having obtained title to the property before the tax levy was made, the lien of the taxes had not attached at that time, and the state took the property free from such lien. Here there was nothing to prevent the accrual of the lien; the only thing was that the exact amount of the taxes for the year 1920 was not ascertainable at the time the earnest money contract was entered into, and the contract itself excludes the idea that the term "taxes" as used therein had reference to taxes the amount of which was already ascertained.

Section 9235, Rem. Code, has no application for the reason that that section refers to the attachment of the existing lien of taxes as between grantor and grantee where no agreement has been made as to who shall pay such taxes. As between themselves, the parties can, of course, enter into any agreement they see fit in reference to the payment of taxes, whether they have been actually determined as to amount or not, or whether the lien has attached or not. To give the language of the contract any meaning, it is necessary to apply it to the taxes for the year 1920. The word having been inserted with the full knowledge of both parties, must be held to have been placed in the contract for some purpose, and that purpose must be held to have been to cover the only taxes to which reference could possibly have been made, *i. e.*, taxes for 1920.

The trial court was therefore correct in apportioning

the taxes for that year between the parties, and the judgment is affirmed.

PARKER, C. J., FULLERTON, BRIDGES, and HOLCOMB, JJ., concur.

[No. 16009. Department One. February 19, 1921.]

In the Matter of the Estate of SAMUEL ANDERSON.[1]

WILLS (7) — TESTAMENTARY CAPACITY — EVIDENCE—WEIGHT AND SUFFICIENCY. Mental capacity to execute a will is sufficiently shown by evidence that decedent, though affected with softening of the brain and subject to intervals of incompetency, was, in the opinion of experts and others, competent at the time the will was executed.

WITNESSES (44)—TESTIMONY OF TRANSACTION WITH PERSONS DECEASED—SUBJECT-MATTER—CAPACITY TO EXECUTE WILL. Rem. Code, § 1211, excluding evidence of transactions with a person since deceased by parties in interest, is not applicable to a will contest upon the issue as to the mental capacity of deceased to execute the will.

Appeal from a judgment of the superior court for Kitsap county, Jurey, J., entered March 11, 1920, upon findings in favor of proponent, admitting a will to probate, after a hearing on the merits. Affirmed.

J. W. Bryan and *Troy & Sturdevant,* for appellant.

Farrell, Kane & Stratton, for respondents.

PARKER, C. J.—This is a will contest. Christine Clinton, sister of Samuel Anderson, deceased, has appealed to this court from a decree of the superior court for Kitsap county, admitting to probate and establishing, as his last will and testament, a writing signed and executed by him on January 1, 1919. At the time of making the will in question and at the time of his death, Anderson was a bachelor, about sixty years old, living in Kitsap county, in this state. His

[1]Reported in 195 Pac. 994.

only heirs at law, at the time of making his will and also at the time of his death, were his sister, Mrs. Clinton, living near Olympia, in Thurston county; and a nephew living in Kitsap county and a niece living in Sweden, the children of a deceased sister. He was on friendly terms with his sister and his niece, but for some reason did not have a friendly feeling towards his nephew. He was also on very friendly and intimate terms with Mr. and Mrs. Phinney, to whom he left a portion of his property, he being the caretaker of their summer home in Kitsap county during the fall and winter months, where they very often spent their week-ends during those months, on which occasions he was treated almost as a member of their family. He had accumulated in this country an estate of the value of approximately four thousand three hundred dollars, consisting of money in bank, mortgage loans, and other securities. He also had some real property in Sweden, apparently of small value.

By the terms of his will, he left one-half of a two thousand dollar promissory note, secured by mortgage, to his friend, Arthur A. Phinney; a promissory note for one thousand one hundred dollars, secured by mortgage, to his friend, Mrs. Phinney; his real property in Sweden to his niece; and all of his remaining property to his sister, Mrs. Clinton, appointing her executrix of his will. Mrs. Clinton having applied for letters of administration to the superior court for Kitsap county, and alleging that the will was void and of no effect because of duress inducing Anderson to execute it, and also because of his mental incapacity to execute it, Mr. and Mrs. Phinney filed their answer and petition praying that the paper purporting to be Anderson's last will and testament be admitted to probate and established as such. Upon the issues so made, the question of the validity of the will was tried

and submitted to the court, resulting in the court finding that the will was duly executed without duress and that Anderson was mentally competent to execute it, and decreeing accordingly. It is from this decree that Mrs. Clinton has appealed.

As to the alleged duress inducing Anderson to execute the will, we think it sufficient to say that the contentions here made in behalf of appellant rested upon that ground are wholly without support in the evidence. As to the question of mental incapacity on the part of Anderson to execute the will, there is sharp conflict, not only in the opinion testimony, but also in the testimony touching Anderson's actions at and near the time of the execution of the will. He was apparently a man of good physique, strong and healthy, both physically and mentally, up until September, 1918. He then began to be afflicted with ailments which, according to the doctors, developed into what they characterized as softening of the brain. Up until January 1st, the date of the execution of the will, his affliction had progressed to the stage where, at intervals, he was admittedly more or less mentally incompetent; but we think that up to that time the evidence shows, or at least the trial judge was warranted in believing—as he evidently did—that Anderson was, during the larger part of the time, mentally competent, knowing what he was doing and saying, and intelligently comprehending his desires touching the management and disposition of his property.

We think that, up to that time in any event, he may be considered as one who was, generally speaking, mentally competent, with intervals of mental incompetency; rather than one who was, generally speaking, mentally incompetent with intervals of mental competency. In any event, the evidence we think clearly preponderates in support of the conclusion that

he was, on January 1st, the date of the execution of the will, mentally competent to execute such will, having then a full and rational understanding of his desires in that respect. It is true that thereafter his condition did grow worse and on February 15, 1919, Mrs. Clinton, his sister, was appointed guardian of his estate. This, however, it seems, was done more because of the necessity of making certain the legality of the use of his funds in caring for him than for the purpose of otherwise preserving or managing his estate. He died on February 24, 1919.

We feel quite convinced, in view of the manner in which Anderson disposed of his property in the will—that is—the fact that he gave his property to those who manifestly he would under the circumstances feel friendly and well disposed towards, and in view of the "*quantum* of understanding which is requisite to the valid execution of such an instrument" (see *In re Roy's Estate,* 113 Wash. 277, 193 Pac. 682), that we would be wholly unwarranted in disturbing the decree of the trial court admitting to probate and establishing this writing as Anderson's last will and testament.

Relying upon the provisions of Rem. Code, § 1211, contention is made in behalf of appellant that the trial court erred in permitting Mr. and Mrs. Phinney to testify touching the mental condition of Anderson at and near the time of the making of the will, especially in so far as such testimony related to their conversations with him. This contention is presented to us without any argument or citation of authority whatever, other than its mere assertion and the citing of this section of the statute. We note that, prior to the giving of testimony by Mr. and Mrs. Phinney, Mrs. Clinton testified in her own behalf—that is, testified in opposition to the probate of the will—to matters which

would be equally within the claimed prohibition of § 1211, if such prohibition has any application to testimony introduced upon the contest of a will. However, the great weight of authority, and it seems to us the better reason, touching the question of the mental competency of a testator in a proceeding contesting his will, is as stated in the text of 40 Cyc. 2266, as follows:

"The statutes excluding evidence in actions by or against representatives, or relating to transactions with a decedent, are usually held not applicable in proceedings for the probate or contest of a will." *In re Veazey*, 80 N. J. Eq. 466, 85 Atl. 176, Ann. Cas. 1914A 980, and note.

We may also add that, even excluding all evidence of the nature so objected to, we would still be strongly inclined to the conclusion that Anderson executed his will without duress and in full possession of his mental faculties at the time of its execution.

The decree is affirmed.

FULLERTON, HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 15792. Department One. February 23, 1921.]

The State of Washington, *Respondent*, v. H. Demas, *Appellant*.[1]

Witnesses (103)—Impeachment—Character of Witness—Habits—Immorality. The prosecuting witness in a prosecution for sodomy cannot be impeached by proof of immoral habits or individual acts of immorality.

Criminal Law (213)—Trial—View of Premises—Discretion of Court. Whether the jury in a criminal case shall be permitted to view the premises is entirely discretionary.

Same (131)—Evidence—Admission—By Accused to Peace Officer. In a prosecution for sodomy, it is admissible for the officer making the arrest to testify that accused admitted having seen the complaining witness on the day in question in the vicinity of the place where the crime was alleged to have been committed.

Sodomy—Defenses—Immorality of Prosecuting Witness. In a prosecution for sodomy, it is proper to instruct that the moral character of the prosecuting witness is immaterial, except upon the question of his credibility.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 25, 1919, upon trial and conviction of sodomy. Affirmed.

C. D. Liliopoulos and *William Sheller*, for appellant.

Thos. A. Stiger, for respondent.

Bridges, J.—The defendant was convicted of a certain crime which the state charged he had committed. From judgment of sentence, he has appealed. By independent testimony, he sought to impeach the testimony of the complaining witness for the state by showing that he had been guilty of immoral acts and conduct, and the court sustained the state's objections to that character of testimony. In its ruling it said:

"There is only one thing I will permit you to show with reference to the witness (complaining witness)

[1]Reported in 195 Pac. 1001.

and that is his reputation for truth and veracity. Whether he was immoral or moral was not a matter upon which he can be impeached, but you may simply show his reputation for truth and veracity as affecting his credibility as a witness. . . . Now, it is wholly immaterial to this case whether this boy is immoral or very moral except in so far as it may bear upon his testimony—his credibility as a witness. Now, you cannot bring witnesses to prove he is immoral . . . but whether or not this boy has been guilty of things which made it necessary for the school authorities to chastise him or reprimand him is not an issue in this case, and you cannot show those things even for the purpose of affecting his credibility as a witness, but if you want to impeach his testimony you may show whether or not he is a boy whose word is considered good or bad in the community in which he lives, whether or not he is a truthful or untruthful boy."

The appellant argues that he was entitled to show the immoral character of the state's witness, and cites several cases in support of this contention. Among those cited are *State v. Jackson,* 83 Wash. 514, 145 Pac. 470, and *State v. Gaul,* 88 Wash. 295, 152 Pac. 1029. This court in those two cases held that independent and separate testimony might be received to show the general moral reputation of a witness for the purpose of affecting his credibility, but we have never gone so far as to hold that occasional or isolated instances of immoral acts might be proven for that purpose. In the case of *State v. Jackson, supra,* we said:

"We nevertheless believe that the reputation of a witness for immorality may be inquired into, either upon cross-examination or by a resort to general reputation. It is not the manner of proof that concerns the law so much as the object sought to be attained, for, as said by this court in the *Coella* case, a woman cannot ruthlessly destroy that quality upon which most other good qualities are dependent and for which, above all others, a woman is reverenced and respected,

and retain her reputation for truthfulness unsmirched. We can mark no distinction between receiving evidence as to the reputation of a witness for truth and veracity and receiving evidence of reputation as to moral character, when this court has said that a reputation for immorality is a thing to be considered when passing upon the credibility of a witness."

It will be observed that the court in that case limited the proof to reputation for morality or immorality. We have no disposition to enlarge upon the doctrine of that case. But it is stated that we have already broadened the doctrine of the *Jackson* case, because, speaking of that case in *State v. Gaul, supra,* we said:

"That case and the cases followed passed upon the question of the admissibility of evidence to show immoral habits or conduct of witnesses, either upon cross-examination or by the direct testimony of other witnesses to affect the credibility of the witnesses assailed, and whether that method of impeachment was as permissible as any other."

When we used the words "immoral habits or conduct of witnesses," we were using them in the sense of the reputation of the witness concerning his morality or immorality, and there was no intention of holding or intimating that individual acts of immorality might be shown.

It is said, however, that the ruling of the trial court upon the objections made was broad enough to deny the appellant the right to introduce independent testimony showing, if he could, the reputation of the state's witness for immorality. The result of the court's ruling was entirely right, because the question asked by the appellant sought to bring out individual acts of immorality. At no time did he offer to show the reputation of the state's witness for morality or immorality. On the contrary, during the progress of his ruling the court asked appellant's attorney what he proposed

to prove by the witness then on the stand, to which the attorney answered that he wanted "to prove that the complaining witness, Milton Draper, had been found in the commission of immoral acts while attending the school under—especially the class of Mr. Duskin, and that he exhibited an immoral character." The Mr. Duskin mentioned was appellant's witness then being examined by his attorney. While the court in making its ruling said some things which might tend to indicate that it was of the opinion that appellant could not attack the reputation for morality of the state's witness, yet it said other things which indicated an entirely different state of mind. In any event, the court was not called upon to rule on this question, nor did appellant intimate that he wanted to introduce any evidence of this character.

The appellant claims error because the court refused his request that the jury be permitted to view the premises where it was alleged the crime was committed. Quite elaborate maps had been made by competent witnesses showing the location and its surroundings, and various witnesses had testified in great detail on the subject. Whether the jury will be permitted to view the premises where a crime is committed or accident happens is entirely discretionary with the trial court. In this instance, we cannot hold that the court abused its discretion. On the contrary, there is nothing in the record to indicate that there was any considerable necessity for the jury to see the premises or that the appellant could have, in any wise, been prejudiced by the decision of the court. From the maps and the witnesses, the jury could easily acquire an intimate and accurate knowledge of the place and its surroundings.

One Wilson, a witness for the state, testified, over the objections of the appellant, that he was one of the

peace officers of King county, and had arrested the appellant for the crime for which he was tried. He further testified to a conversation between himself and the appellant wherein the latter had admitted to him that he had seen Milton Draper, the complaining witness, on the day in question and at the place where the crime is alleged to have been committed. The appellant objected to this testimony and requested the court to give the following instruction concerning it, to wit:

"The evidence of the witness Wilson that the defendant made admissions that he had seen the complaining witness, Milton Draper, in the vicinity of the place where this crime is claimed by the state to have occurred, is no evidence that the defendant committed or participated in the commission of the crime charged in the information."

We think the court ruled properly in permitting this witness to testify and in refusing to give the appellant's requested instruction. That testimony tended strongly to show that the appellant was at or near the place where the crime was committed, at the time it is alleged to have been committed, and was with or near the complaining witness, and it also tended to corroborate the testimony of that witness.

The appellant also complains about the court's instruction No. 3, reading as follows:

"You are instructed that it is wholly immaterial what the moral character of the complaining witness, Milton Draper, was, or is, so far as the guilt or innocence of the defendant is concerned, and the only purpose for which you should consider any testimony bearing on the character of the said witness, if at all, is in so far as it will affect the weight which you will give to his testimony."

This instruction properly stated the law and is not open to criticism.

There are one or two other assignments of error which we deem it unnecessary to discuss. We have carefully considered them and do not find any merit in them. The record indicates that the appellant has had a fair trial, and we cannot see any reason why the cause should be reversed. The judgment is affirmed.

PARKER, C. J., MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16257. Department One. February 23, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES W. KELCH, *Appellant*.[1]

CRIMINAL LAW (460)—PUNISHMENT OF SECOND AND SUBSEQUENT OFFENSES—PROCEDURE—SENTENCE. Rem. Code, § 2286, providing for the punishment of habitual criminals who have twice before been convicted of felony, is not a supplemental but a cumulative proceeding, and does not require the charge of a substantive crime; and after a third conviction, the charge of being an habitual criminal is an independent charge which may be tried before a judge of another department of the court, before sentence on the third felony charge; and after conviction of being an habitual criminal, the accused may be sent back for sentence to the judge who tried the last felony charge.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 14, 1920, upon a trial and conviction of being an habitual criminal. Affirmed.

James M. Palmer, for appellant.

Fred C. Brown and *John A. Frater*, for respondent.

HOLCOMB, J.—The appellant appeals from a conviction and sentence to life imprisonment upon a charge of being an habitual criminal.

Ten assignments of error are made which, con-

[1]Reported in 195 Pac. 1023.

densed, are substantially as follows: (1) that appellant should have been sentenced after being convicted of grand larceny, and before the second information, charging him with being an habitual criminal, was filed; (2) that the court should have quashed the information charging appellant with being an habitual criminal; (3) that the same judge who tried him on the charge of grand larceny should also have tried him on the charge of being an habitual criminal; (4) that the court which tried him for being an habitual criminal erred in not sentencing him; and (5) that the court which did sentence him, being the same court which tried and convicted him of grand larceny, erred in sentencing him to life imprisonment after being advised by the prosecuting attorney that appellant had been convicted of being an habitual criminal, and that the court was wholly without jurisdiction to so pass sentence upon him.

Appellant brings up two records: (1) the conviction of grand larceny after trial before His Honor, Judge Jurey; and (2) of a conviction of being an habitual criminal upon three convictions for felony.

The original information is not assailed, and there is no question of the sufficiency of the information or the proceedings upon which he was tried on the charge of grand larceny before Judge Jurey. There is no attack made upon the second information except upon the ground that the state had no right to file such second or supplemental information prior to appellant's being sentenced upon the conviction of grand larceny by the judge before whom he was tried therefor. Upon his conviction of grand larceny, and before his sentence, the state filed a supplemental or further information charging him with being an habitual criminal, from having been three times convicted of crime, as denounced in the statute upon habitual criminals,

§ 2286, Rem. Code; and upon this second information appellant was tried before another judge of the superior court of King county, His Honor, Judge Tallman. Upon his plea to the information he was placed upon trial before a jury, and upon the record was convicted. He was then taken before Judge Jurey, who tried him upon the grand larceny charge, and by him sentenced as the statute requires, to life imprisonment.

We think there is no merit in any of appellant's contentions. We have, in *State v. Driscoll,* 86 Wash. 245, 150 Pac. 2, held that under the previous statutes, §§ 2178 and 2179, Rem. & Bal. Code, which were superseded by § 2286, Rem. Code (*State v. Gustafson,* 87 Wash. 613, 152 Pac. 335; *State v. Cotz,* 94 Wash. 163, 161 Pac. 1191), although the statute made no provision for another judge to try a defendant on a supplemental information, the statute provided that the state shall, before sentence, empanel a jury to try the facts of such former conviction; and that, although the statute made no provision for another judge to try the defendant upon a supplemental information, nevertheless this court took notice of the fact that the superior court of King county is composed of several judges. We concluded that, because the facts were determined by different judges of that court, it could not be considered that these facts were not determined by the court, and that it was not error for either judge to take into consideration both verdicts in determining what sentence should be pronounced. In that case it was pointed out that Judge Ronald did not sentence the appellant there upon the original trial before Judge Ronald; that a supplemental trial was had, and that Judge Gilliam, before whom the supplemental trial was had, entered the sentence. We held also that it was not necessary to pronounce judgment upon the original conviction before a trial was had on the supplemental information.

The present statute, § 2286, Rem. Code, does not refer to the proceedings against a person as an habitual criminal as supplemental proceedings, or the information as a supplemental information. It simply provides:

"Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years.

"Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life." (Rem. Code, § 2286).

Under this statute, a proceeding is not a supplemental proceeding to convict a person of being an habitual criminal; it is a cumulative proceeding, and the only thing that is necessary is that the defendant shall theretofore have been convicted of a crime of which fraud or intent to defraud is an element, or petit larceny, or of some felony, before the new proceeding charging the defendant with being an habitual criminal may be prosecuted. Under this statute, al-

though we never had this exact question presented to us before, the language of Judge Chadwick in his separate concurring opinion in *State v. Cotz, supra,* is applicable. In his separate concurring opinion he says:

"The habitual criminal statute does not require a charge of a substantive crime. The sufficiency of the original information, the facts necessary to sustain a conviction, and the ordinary rules governing pleadings in criminal cases have no application whatever. When the prosecuting attorney has charged, by simple reference to the judgments, that a party has been convicted three times, he has done all that the law requires, for it is not a question of guilt or innocence, but merely a question involving a state of the record, either in the court where the charge is made, or some other court. It is necessary, when pleading a judgment, to say no more than that a judgment (describing it) was rendered in a certain court at a certain time. The only plea open to one so charged is that of *nul tiel record,* or that the judgment has been satisfied in some way recognized by the law."

We adopt that reasoning as appropriate here. The charge of being an habitual criminal was an independent charge and not a continuation of the previous prosecution for grand larceny, except that there had to be a previous conviction of grand larceny or some such charge before the subsequent charge would lie.

Nor was it erroneous for another judge of the superior court of that county to pass sentence upon the person found guilty of being an habitual criminal, for the reason that there is no discretion involved. The sentence to be imposed was mandatory. The court of that county, under the language of the statute, was any or all of the judges of that county, and any of them could pass the sentence imposed by law.

Finding no error, the judgment and sentence are affirmed.

FULLERTON, MACKINTOSH, and BRIDGES, JJ., concur.

PARKER, C. J. (concurring)—I fear that the language of this decision emphasizes too strongly the independence of an habitual-criminal prosecution from a previous prosecution for another offense, and that the decision leaves some room for arguing that an habitual-criminal prosecution can be lawfully had after and entirely independent of a prosecution in which a final judgment and sentence are rendered upon an information charging another offense. I am convinced that the language of the statute means that an habitual-criminal prosecution can be had only after a finding of guilt of another offense and before the rendering of judgment and sentence upon such finding—which is what was done in this case—and that, after final judgment and sentence rendered upon such finding of guilt of another offense, jurisdiction over the cause, including jurisdiction to proceed under the habitual-criminal statute, ceases to exist.

If this be not the law, one might be accused and found guilty of a number of specified offenses, have judgments rendered against him thereon, pay the penalty of each conviction, and thereafter be subject to prosecution as an habitual criminal unconnected with any other prosecution. I hardly think the foregoing decision means to open the way to such a holding, but I do conceive that its language furnishes some room for argument looking to that end. While I am of the opinion that the trial court did not commit error in entertaining jurisdiction in the habitual-criminal prosecution, I think that court would have committed fatal error had it entertained such jurisdiction after rendering final judgment and sentence upon the verdict in the larceny prosecution.

I concur in the result reached by the majority.

[No. 15848. Department Two. February 23, 1921.]

H. W. DEMUTH *et al.*, *Appellants*, v. J. W. KLEEB *et al.*, *Respondents*.[1]

JUDGMENT (204-1)—CONCLUSIVENESS—PERSONS CONCLUDED — TRUSTEE AND CESTUI QUE TRUST. A judgment of dismissal, with prejudice, of an action by a trustee in bankruptcy to recover unpaid stock subscriptions due the insolvent corporation, upon a settlement of the liability, is a bar to another action by creditors to recover on the same stock subscriptions.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered December 13, 1919, dismissing an action to collect unpaid stock subscriptions, after a trial to the court on the merits. Affirmed.

Chas. W. Johnson, for appellants.

Gerard Ryzek, for respondent Faw.

B. B. Horrigan, for respondent Kleeb.

MAIN, J.—The plaintiffs in intervention, being judgment creditors of a bankrupt corporation, brought this action for the purpose of recovering from the defendants, who are alleged to be stockholders of the corporation, upon their unpaid stock subscription. The defendants denied liability and plead that, in another action brought by the trustee in bankruptcy, their liability as stock subscribers was settled and adjusted, and the action in that proceeding was dismissed as to them with prejudice. The trial of the present action resulted in a judgment of dismissal, from which plaintiffs appeal.

The Pasco Theatre Company was a corporation organized and existing under the laws of the state of

[1]Reported in 195 Pac. 996.

Washington, and in the year 1915 becoming insolvent, filed petition in bankruptcy in the Federal court, and was adjudged a bankrupt. A trustee in bankruptcy was appointed, and in course of time he brought action in the superior court of Franklin county against the stockholders of the company for the purpose of recovering upon the unpaid stock subscription. The respondents, Kleeb and Faw, were parties to the action. They there denied liability as stockholders, claiming that they had neither subscribed nor accepted stock in the company. Before that action came to trial, a stipulation was entered into between them and the trustee in bankruptcy whereby the claim against them as stockholders was settled and adjusted. This stipulation was approved by the court, and on December 21, 1916, a judgment was entered dismissing the action against them with prejudice. The stock subscription upon which recovery was sought in that action is the same stock subscription upon which recovery is sought in the present action.

In *DeMuth v. Faw,* 103 Wash. 279, 174 Pac. 18, it was held—and the holding is but the expression of the general rule—that the trustee in bankruptcy represents the creditors and that subscriptions to the capital stock of a bankrupt corporation pass by a decree in bankruptcy as a part of the assets of the insolvent corporation to the trustee who is entitled to enforce the liability of the stockholders. If, as held in that case, the trustee in bankruptcy represents the creditors and the stock subscription passed to him as an asset of the estate, it is difficult to see how the present action could be maintained so long as a judgment of dismissal in the action brought by the trustee upon the same alleged stock liability remains in full force and effect. The judgment is not attacked for fraud, and so long as it is not vacated, is clearly a bar to another action.

The rule invoked by the appellants to the effect that a discharge in bankruptcy of the corporation does not work a discharge of the stockholders upon unpaid stock subscriptions can have no application here so long as the dismissal judgment in the action brought by the trustee in bankruptcy stands.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 16083. *En Banc.* February 23, 1921.]

FRANK LINN, *Respondent*, v. C. W. REID, *Appellant*.[1]

SALES (96, 99)—RIGHTS OF BUYER—TITLE OF BONA FIDE PURCHASER—GOODS OBTAINED BY FALSE PRETENSES. Where the owner of an automobile voluntarily delivered the possession with the intent to pass the title in a trade for another car, which had been stolen, without any element of trespass on the part of his vendees, a *bona fide* purchaser of his car from such vendees is protected under the rule that, where one of two innocent persons must suffer by the fraud of a third, the loss must fall upon the one who made it possible.

STATUTES (56, 65)—CONSTRUCTION—INTENT—HISTORY OF ACT. In construing an act, the history of the act, the ordinary use of words at the time of the passage of the act and the meaning adopted at that time, should be considered.

LARCENY (1)—STATUTORY PROVISIONS—DISTINGUISHED FROM FALSE PRETENSES. Rem. Code, § 2129, providing that all property obtained by "larceny . . ." shall be restored to the owner and no sale shall divest the owner of his rights, has reference to "larceny" as defined by that act (Laws 1854, p. 83 *et seq.*, §§ 45, 46, 55), which did not include obtaining money by false pretenses, which was a distinct offense under Id., § 54, although larceny as now defined includes that offense; hence property obtained by false pretenses does not fall within the protection of § 2129, and may pass to *bona fide* purchasers from the wrongdoers.

HOLCOMB, J., dissents.

[1]Reported in 196 Pac. 13.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 10, 1920, upon findings in favor of the plaintiff, in an action of replevin, tried on the merits to the court. Reversed.

A. O. Burmeister and *Remann & Gordon,* for appellant.

O. S. Galbreath, for respondent.

MITCHELL, J.—The facts in this case are not in dispute. Those pertinent to the decision are substantially as follows: On November 8, 1919, the plaintiff, a resident of Lewis county, was the owner of a Maxwell car; on that day two persons, driving a Hudson car which they had stolen from its owner in Portland, traded it to the plaintiff for the Maxwell car, each giving to the other the possession of the car traded for; thereafter the lawful owner of the Hudson car caused the plaintiff to surrender it; on November 15, 1919, the plaintiff found the Maxwell car in the possession of the defendant, who, on November 10, 1919, had purchased it from the persons who had obtained it in the trade with the plaintiff; the defendant paid to the two men for the Maxwell car the sum of $275, which was its reasonable value; before the purchase, the defendant, upon inquiry, was informed by the two men that they were from Centralia, Washington, were butchers by occupation, and that they were desirous of selling the Maxwell car as they were moving to the city of Tacoma; the defendant's refusal of plaintiff's demand to deliver the car resulted in this action of claim and delivery.

The trial resulted in findings of fact substantially as above set out, to which no exceptions were taken. From the findings the court concluded the defendant was a *bona fide* purchaser of the Maxwell car, but that the

plaintiff was the lawful owner of it and entitled to recover possession of it. From a judgment in favor of the plaintiff, the defendant has appealed.

In considering the case, sight must not be lost of the manner in which respondent surrendered his car. He traded it and delivered possession of it to the two persons who traded and delivered to him possession of the Hudson car. There was no element of trespass on the part of the two persons in getting the Maxwell car. It was voluntarily surrendered by the respondent who parted with possession of it with intent to pass title to the wrongdoers, thus giving to them all the *indicia* of ownership and the apparent right of disposal. Under such circumstances, in the absence of a statutory rule to the contrary, a *bona fide* purchaser from the vendee will be protected. It is but the enforcement of the old and familiar rule that, of two innocent persons one of whom must suffer by the fraud of a third person, he who has put it in the power of such third person to commit the fraud must be the sufferer. The basis of protection to the *bona fide* purchaser, in cases such as the present one, is the voluntary act of the original vendor in parting with both the title to and possession of the property. Unless this difference in the manner in which property is acquired from its lawful owner is kept in mind—that is, whether by trespass, or by the voluntary act of the lawful owner—a misunderstanding of the well-reasoned cases may follow.

In the case of *Cochran v. Stewart,* 21 Minn. 435, it was said:

"The true rule, as we think, is that in case of the sale and delivery by the owner of personal property, although he may have been induced to make such sale and delivery by fraudulent acts and representations of the vendee, amounting to a felony by statute, the

vendee may convey a good title to a *bona fide* purchaser."

The same principle is clearly set forth and approved by this court in the case of *Woonsocket Rubber Co. v. Loewenberg Bros.*, 17 Wash. 29, 48 Pac. 785, 61 Am. St. 902, quoting with approval from the case of *Barnard v. Campbell,* 58 N. Y. 73. Other authorities to the same effect are: Benjamin, Sales (7th ed.), §§ 433 *et seq.;* 24 R. C. L. 378, § 665; 35 Cyc. 361-2, par. g.

Respondent contends the case of *Globe Milling Co. v. Minnesota Elev. Co.*, 44 Minn. 153, 46 N. W. 306, repudiates the doctrine of the *Cochran v. Stewart* case, *supra.* We do not so understand. Only a casual reading of that case shows it turned upon the question of delivery of the property; it having been found the owners had never delivered the personal property, and hence there was no element of estoppel against their claiming against one who claimed to be a purchaser from the owner's vendee. For that reason, it was held the rule in the case of *Cochran v. Stewart, supra,* did not apply.

Respondent's counsel, however, calls attention to § 2129, Rem. Code, which is as follows:

"All property obtained by larceny, robbery, or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; . . ."

And § 2601 (Id.), which is as follows:

"Every person who, with intent to deprive or defraud the owner thereof—(1) Shall take, lead or drive away the property of another; or (2) Shall obtain from the owner or another the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not author-

ized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or (3) . . .; or (4) . . .; and (5) . . .; Steals such property and shall be guilty of larceny."

Therefrom it is argued that appellant's vendors having obtained the car from respondent under circumstances amounting to larceny, therefore, under the express provisions of § 2129 of the code, the sale of the car to the appellant, whether he purchased it in good faith or not, did not divest the respondent of his right to the property.

An examination of the history of this legislation, coupled necessarily with the intent of the legislature in enacting § 2129 of the code, will show that the judgment in this case cannot rest upon this contention of the respondent. The question here turns not upon the meaning to be given to that portion of § 2601 (Id.), defining larceny applicable to the act of appellant's vendors in obtaining the car from the respondent (subdivision 2, obtaining goods by false pretenses), but upon the meaning of § 2129 preserving property rights in stolen goods—that is, goods obtained by larceny, robbery or burglary, as those terms were understood and intended to be used by the legislature at the time it enacted what is now § 2129 of Remington's Code.

The first territorial legislature of 1854 enacted the following laws, viz.:

Laws of 1854, p. 83, §§ 45 and 46, defining grand and petit larceny, each of which required the feloniously stealing, taking and carrying, leading or driving away the personal property or goods of another. Section 53, p. 84:

"Every person who shall falsely represent or personate another, and in such assumed character, shall receive any money or other property whatever intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny."

Section 55, p. 85, embezzlement of money or other property, declared to be larceny.

Section 51, p. 84:

"All property obtained by larceny, robbery or burglary, shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; . . . ".

And section 54, p. 85:

"If any person with intent to defraud another, shall designedly by color of any false token or writing, or any false pretense, obtain from any person any money, transfer, note, bond or receipt, or thing of value, such person, shall, upon conviction thereof, be imprisoned in the penitentiary not more than five nor less than one year, or imprisoned in the county jail for any length of time not exceeding one year."

All six of these sections are found in the same chapter—ch. 3, p. 82, of the Laws of 1854. They were continued in force, and without change carried into the code of 1881, and are found therein at §§ 830, 831, 834, 835, 851 and 853, pp. 166-170. In 1909, the legislature re-defined larceny by including therein, for the first time, acts consisting of obtaining goods by false pretenses (Laws of 1909, § 349, p. 997). In 1915, it was re-enacted with a slight change, not material here (Laws of 1915, § 3, p. 493), in which form it is now § 2601, Rem. Code.

During all this time, the legislature has in no way altered, modified, or re-enacted the statute protecting the owner in his rights to property obtained by lar-

ceny, robbery or burglary, as that statute is found in the session Laws of 1854, and the code of 1881, the same now being § 2129, Rem. Code. At the time of the trade of the Maxwell car to appellant's vendors, § 2129 meant just what it did in 1854 when it was enacted. In endeavoring to ascertain just what the legislature of 1854 intended in enacting that statute, we must, as far as possible, place ourselves in the light that legislature enjoyed, and discover its purpose and intent from the language used. Or, as was tersely said in *Bloomer v. Todd,* 3 Wash. Terr. 599, 19 Pac. 135:

"The ordinary use of words at the time when used. and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent, as it is always the intent of any written instrument or law at the time it was made that is to govern in enforcing it."

And further, in the same case:

"When giving a construction to a statute, the thing which we are to arrive at with as much certainty as we are able is the thought which it was intended to express, and the intent of the power prescribing the rule; and we are to enforce this intent as it existed at the time it was made."

See, also, *United States v. Union Pac. R. Co.,* 91 U. S. 72; *Platt v. Union Pac. R. Co.,* 99 U. S. 48; *In re Bergeron,* 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917 A 549.

It may be observed here that, at common law, there was a distinction between larceny and obtaining goods by false pretenses. They were separate and distinct crimes. *Smith v. People,* 53 N. Y. 111, 13 Am. Rep. 474; *Thorne v. Turck,* 94 N. Y. 90, 46 Am. Rep. 126; *People v. Rae,* 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102; 17 R. C. L., § 6, p. 8; 2 Chitty's Blackstone (4), pp. 229 *et seq.,* and 158 and note. They were treated as distinct crimes by the legislature of 1854, as already

seen. They were so considered in the same chapter of the same act. It follows, therefore, from the settled rule of statutory construction adverted to, that when, in that same chapter and act, the legislature of 1854 provided that no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to property obtained from him by larceny, robbery or burglary, it was the equivalent of declaring that no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to property obtained from him by the feloniously stealing, taking and carrying, leading or driving it away, or by embezzlement, or by the false personation of another, or by robbery or burglary. If that statute were in such substituted words now (as in legal effect it is) there could not be any controversy in this case. Those were the only ways in which larceny could be committed. That was all the word larceny meant. It was in that sense it was employed and understood by the legislature. In addition to the word "larceny", it did not say "as herein defined or as it may be hereafter defined by the legislature", nor did it use any other words of similar import. Had the legislature at that time gone further and said that the protection afforded the owner as against the rights of a *bona fide* purchaser from a wrongdoer shall not apply in the case of a *bona fide* purchaser from one who obtains goods by false pretenses, the situation would then have been just as it was actually provided, since it is seen that the crime of obtaining money or other property by false pretenses was defined to be a separate crime, and not included in the definition of larceny, robbery or burglary.

It is true that, by the criminal code of 1909, the distinction between larceny and obtaining goods by false pretenses was broken down, yet there has been no re-

adjustment by the legislature of the statute protecting the property rights of the owner as against those of a *bona fide* purchaser from a wrongdoer by any re-enactment of that statute so as to cover additional kinds of transactions since defined to be larceny. The virtue of the statute is not to be found in the word "larceny", as used in any sense other than to identify that class of acts or transactions which the legislature then had in mind, against which the owner of property would be protected; and its scope cannot be extended by later legislative enlargement of the kind of transactions called by that name. To extend the intention of the legislature of 1854, as expressed in its statute, § 51, p. 84 (now Rem. Code, § 2129), to and ingraft it into this new kind of larceny, which that legislature negatively refused to do, would be an unwarranted extension of the manifest intention of the legislature, under the guise of judicial interpretation.

Counsel for respondent contends the case of *State v. Skilbrick,* 25 Wash. 555, 66 Pac. 53, 37 Am. St. 784, holds contrary to the view we herein express. We think counsel is in error. That was a criminal case in which the defendant was convicted of larceny. The opinion finds that he and his confederates obtained the money of the prosecuting witness in a manner that was without the owner's consent. The opinion quotes from Rapalje on Larceny and Kindred Offenses (§ 14), as follows:

"If by trick or artifice the owner of property is induced to part with the custody or naked possession of it to one who receives the property *animo furandi,* the owner still meaning to retain the right of property, the taking will be larceny."

That is, it was a case of obtaining the possession of property without the consent of the owner that the title should pass, while in the case at bar the appellant

purchased the car from persons to whom the respondent had voluntarily delivered it intending at the time to transfer not only the custody or bare possession of it but the right and title of property in it as well.

Reversed, with directions to enter judgment in favor of the appellant.

PARKER, C. J., FULLERTON, MAIN, TOLMAN, MACKINTOSH, and BRIDGES, JJ., concur.

HOLCOMB, J. (dissenting)—The statute protecting title to personal property, while passed long before the present statute defining larceny, is as much a continuing positive law as if they had been passed in the same act. Had the statute protecting the title to personal property been enacted at the same time, or after, the statute defining larceny, there would be no question but that they would be construed together, and that the statute protecting title to personal property would apply in this case.

I therefore dissent.

[No. 16177. Department Two. February 23, 1921.]

LEONARD LONGMIRE *et al., Respondents,* v. YELM IRRIGATION DISTRICT, *Appellant.*[1]

WATERS AND WATER COURSES—FLOWAGE—INJURIES FROM CONSTRUCTION OF DITCH—EVIDENCE—SUFFICIENCY. An irrigation district impounding and conveying water is bound to exercise only ordinary care in the construction of ditches, and an owner of land lying below the ditch cannot recover damages caused by overflowing the land through seepage without showing that the ditch was negligently constructed; and in the absence of evidence, negligence will not be presumed.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered November 2, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for an injunction and damages. Reversed.

Geo. F. Yantis and *Troy & Sturdevant,* for appellant.

Thomas M. Vance, for respondent.

TOLMAN, J.—Respondents as plaintiffs brought this action against appellant as defendant, to restrain the operation of an irrigation canal and to recover damages to growing crops, alleged to have been suffered during the year 1918, by reason of the negligent and improper construction and operation of the canal.

At the trial below, no evidence of improper or negligent construction or operation was offered, respondents going no further than to offer testimony to the effect that the canal followed a ridge some thirty or forty feet above the land where the damage is alleged to have occurred, and that the character of the soil of the ridge through which the canal runs is partly gravel, with some sand, and that, after the canal was

[1]Reported in 195 Pac. 1014.

constructed and in operation, there was an increased seepage of water from the hillside below the canal onto the lands affected, rendering a portion unfit for cultivation, and lessening and damaging the crops on an additional area.

At the close of respondents' case, appellant moved for a nonsuit because of the failure to show negligent construction or operation of the canal (and for other reasons), which motion being denied, it offered evidence tending to show that there was no greater seepage from the hillside when the canal was in operation than when it was not, or than had occurred before the canal was constructed; and also offered evidence to the effect that, upon the opposite side of the ridge, was a slough containing a considerable body of water upon a higher level than the lands alleged to have been damaged, and distant but little more than five hundred feet therefrom, and from which the seepage might have come. A verdict for four hundred fifty dollars was rendered against the appellant, who moved for judgment *non obstante veredicto,* and in the alternative for a new trial. These motions being denied, a judgment was entered on the verdict, from which this appeal is prosecuted.

We have already held that one who impounds water is bound to exercise such reasonable care and caution in the construction, maintenance and operation of his works as a reasonably careful and prudent person, acquainted with the conditions, would exercise under like circumstances, but that he is not an insurer. *Anderson v. Rucker Bros.,* 107 Wash. 595, 183 Pac. 70, 186 Pac. 293. The law seems to be well settled in this country that ditch owners are bound to exercise only ordinary care in the construction and maintenance of their ditches (15 R. C. L. 488), and that an owner of land lying below an irrigation ditch cannot

recover for damages caused by seepage without showing that the ditch was negligently constructed or operated. *North Sterling Irr. Dist. v. Dickman,* 59 Colo. 169, 149 Pac. 97, Ann. Cas. 1916 D 973; *Nahl v. Alta Irr. Dist.,* 23 Cal. App. 333, 137 Pac. 1080.

Respondents rely upon the case of *Howell v. Big Horn Basin Col. Co.,* 14 Wyo. 14, 81 Pac. 785, 1 L. R. A. (N. S.) 596, but a careful reading of that case convinces us that it announces no other or different doctrine. It is there said:

"The district court therefore properly held that the plaintiff could not recover for the damage from seepage unless the same was shown to have resulted from the negligence of defendant. We think, however, that the evidence does not support the finding of no negligence.

"As already explained, the ditch from the reservoir runs along a side hill above the premises of plaintiff, where, at least in one place, a cut was made through sand banks, and in two or three places a fill was made by scraping sand and gravel down from the side of the hill to form the bottom and lower bank of the ditch; thus bringing the bottom some five or six feet above the natural level of the ground. The seepage complained of most probably came from the parts of the ditch so constructed. The engineer in charge of its construction testified that, in his opinion, the seepage came from the cut through the sand banks, and that was also the opinion of the defendant's manager, on account, as he says, 'of the loose condition of the sand banks.'

"It appears that, at the time of construction, water was turned in and teams used in an endeavor to tramp the earth solid; but whether the company made any such endeavors after commencing the operation of the ditch, and the appearance of the seepage on plaintiff's land, is not sufficiently disclosed. The defendant's witnesses testified that the seepage was becoming less each year because of the natural washing down and deposit of sediment in the ditch, as a consequence of

the flow of water therein during each irrigating season; and, while the evidence shows that the officers and agents of the company knew of the seepage, it fails to show, we think, sufficient, if any, precautions on the part of the defendant to prevent the same.

"It is true that the defendant's engineer testified that the canal was properly constructed and on proper grade to carry the water. But that opinion is clearly insufficient to sustain the finding that there was no negligence, in the face of the fact that the water constantly seeped from the ditch to the knowledge of defendant, as a result of its construction through unusually loose and porous soil, without proper effort to prevent it. *Reed v. State,* 108 N. Y. 407, 15 N. E. 735.

"We need not decide whether a ditch owner would be liable for temporary seepage that might be the usual and necessary incident of a new ditch constructed by excavation in the generally prevailing soil of the country and in the usual manner. The question in that case even would depend upon the existence or non-existence of negligence."

In the absence of any evidence as to how the canal was constructed except that it was over and through a gravelly hillside, since negligence is never presumed, the presumption would be that the canal was properly constructed to meet such conditions. Conceding that the jury might properly find from the evidence that the seepage came from the canal, in the absence of any evidence of negligent construction or operation, to permit the verdict to stand would be tantamount to holding that appellant was an insurer. We conclude that the motion for nonsuit or for judgment *non obstante* should have been granted. The judgment is reversed with directions to enter a judgment of dismissal.

PARKER, C. J., MAIN, MOUNT, and MITCHELL, JJ., concur.

[No. 16036. Department One. February 25, 1921.]

BENJAMIN M. LEVINE, *Respondent*, v. FRANCIS N. BARRY *et al.*, *Appellants*.[1]

WITNESSES (72)—CROSS-EXAMINATION—DISCRETION. Upon an issue as to the value of the services of an attorney, cross-examination as to the extent of his business and experience is within the discretion of the court, and it is not error to limit the same as to specific matters after it was covered by a general inquiry.

SAME (72, 79, 85)—CROSS-EXAMINATION—DISCRETION—LIMITATIONS—ASSUMING FACTS—HYPOTHETICAL QUESTIONS. Upon an issue as to the value of the services of an attorney, hypothetical questions to experts must be based upon the testimony in the case, but cross-examination should not be so limited and may be based upon the party's theory of conjectural facts, and the matter does not rest in the discretion of the court.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 24, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action on implied contract. Reversed.

Charles P. Murphy, for appellants.

J. Grattan O'Bryan, for respondent.

BRIDGES, J.—The respondent, Levine, brought this action against the appellants to recover for legal services performed by him for the appellants at their special instance and request. The respondent in his complaint demanded the sum of five hundred dollars. The appellants, answering the complaint, admitted that the respondent had performed legal services in their behalf, but denied that the services rendered were worth the sum of five hundred dollars, or any greater sum than fifty dollars, which sum they paid into court for the respondent's use. After issue joined, a trial was had before a jury, who returned a verdict in the

[1]Reported in 195 Pac. 1003.

respondent's favor for one hundred and twenty-five dollars. This appeal is from a judgment entered on the verdict.

The principal errors assigned are that the court unduly limited the cross-examination of the respondent and the cross-examination of his expert witnesses. After eliciting from the respondent the fact that he had been engaged in the practice of law in the city of Seattle for a period of ten years prior to the time of the trial, it was sought to elicit from him the amount of business he had transacted during that period. After a number of questions had been asked and answered on this subject, he was asked to state how many cases he had tried in the superior court in the last six years. To this question an objection was interposed and sustained by the court. He was then asked if it was not a fact that he had never alone tried a case in the superior court within the six-year period named, to which the witness answered that it was not a fact. Following this, he was asked to name a case which he had so tried without assistance, to which an objection was interposed and likewise sustained. On the rulings of the court on these objections, the appellants base the contention that their cross-examination of the respondent was unduly limited.

The general rule is that an attorney, when suing on *quantum meruit* for professional services, may show not only the nature and character of the services rendered and the result attained, but may show also his standing in the profession for learning, skill and proficiency, and the experience he has had in practice. *Stanton v. Embrey,* 93 U. S. 548; *Randall v. Packard,* 142 N. Y. 47; *Clark v. Ellsworth,* 104 Iowa 442, 73 N. W. 1023.

It is perhaps the rule, also, that the attorney's adversary may show his want of skill and experience to

affect the amount of the recovery, although this branch of the question seems not to have been broached in any of the decided cases. The case most nearly approaching the question to which we have been cited is *Phelps v. Hunt,* 40 Conn. 97. There the attorney sued upon *quantum meruit.* In his case in chief, he testified in his own behalf as to the nature of the services rendered and their reasonable value. On cross-examination he was asked what his professional income was for the year in which he claimed to have rendered the services sued for, and what it was the year before, and what it was the year after. Objections were interposed and sustained to the questions, and on appeal the court held such an inquiry permissible. The court seems, however, to have rested its decision on the peculiar nature of the services performed in the particular case rather than upon a general rule. In the course of the opinion, it was said:

"Should a question arise as to the value of services, in an action brought by an attorney to recover fees, where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, evidence of professional standing is clearly admissible, and is entitled to much consideration. Such seems to have been the character of the case at bar."

But conceding the inquiry proper, the extent to which it is permitted to go must rest in the sound discretion of the trial court. Certainly the court is not required to permit inquiry into the details of the plaintiff's business during all the years he has been engaged in the practice. It is a collateral inquiry at best, and when the matter has been covered by a general inquiry, it cannot be error to exclude examination into details. Here the court permitted the general inquiry. It

stopped the inquiry only after it began to call for specific matters. We cannot hold the ruling error.

With reference to the expert witnesses, after they had testified to the value of the respondent's services based upon his narrative of the services performed, the appellant sought to elicit their opinion upon another and different state of facts; facts not shown by the evidence, but facts which the appellants stated they would offer evidence tending to prove when their side of the case was entered upon. The court sustained objections to the questions, and its ruling furnishes the foundation for the assignment that the cross-examination of the expert witnesses was unduly limited. The respondent contends, and the court seems to have held, that it is entirely within the discretion of the court whether, on cross-examination of an expert witness, it will permit hypothetical questions which are not based on the evidence then in the case. The appellant, on the contrary, maintains that, as a matter of right, he was entitled to propound questions which were based on the facts as he contended he would be able to show them to be.

This assignment of error raises a question of practice which, aside from its importance in this case, deserves serious consideration. Our discussion and decision will be limited to those expert witnesses who testify exclusively from facts stated in hypothetical questions, and not to witnesses whose opinions are based on personal knowledge of the facts from which they draw their conclusions or opinions.

We think it should at once be conceded that the proper rule is that hypothetical questions propounded on direct examination should be based upon the testimony in the case. But cross-examination should not be so limited. The plaintiff here had shown the amount

of his services and the circumstances under which they had been performed, but the defendant had not reached his part of the case, and had not had an opportunity to present his version of the facts. To say that, under these circumstances, the defendant could cross-examine plaintiff's expert witness only upon the facts as produced by the plaintiff, would be, in nine cases out of ten, to deprive him of the benefits of cross-examination, because, usually, the defendant will concede the correctness of the answer of the expert witness, based upon the plaintiff's version of the facts.

We do not think an expert witness is in exactly the same situation as the ordinary witness. He is permitted to give his opinion because he is supposed to be unprejudiced and to be skilled and learned in matters concerning which the average individual is profoundly ignorant. He is not supposed to have any knowledge of the facts of the case. Being ignorant of all the facts, he can testify only from those which are given to him in the hypothetical question. He is permitted to testify for the purpose of throwing light on the question on trial. Such being the situation, the defendant should have been permitted to propound to plaintiff's expert hypothetical questions based upon his theory of what the facts were and not be confined to the facts as shown by his adversary.

An ordinary illustration will show the point we are trying to develop: Suppose that, in a personal injury case, the chief question involved is whether or not a motorman had used reasonable efforts to stop his street car. The plaintiff produces testimony showing that the grade was level and the track dry and at its best for stopping purposes. He produces an expert and submits to him a question based on the testimony just recited. It is defendant's contention, which in due

course he will undertake to prove, that there was a down grade and that the track was slippery, and the conditions bad for stopping. If, under these circumstances, the defendant may cross-examine only upon plaintiff's recital of the facts, then it is likely there is no use to cross-examine at all.

It is our view that the cross-examiner may rightfully propound hypothetical questions based entirely on conjectural facts for the purpose of testing the skill and knowledge of the witness, and where he has not had an opportunity to present his proof as to the facts, his hypothetical question may be based on his contention of what the facts will be as they may be developed later by his testimony, for the purpose of throwing light on the facts as they may ultimately be submitted to the jury. The privilege of such character of cross-examination is a right which does not rest in the discretion of the court, but the extent to which such cross-examination shall go does rest in the discretion of the court. The purpose of the cross-examination is not only to try to break down or weaken the testimony favorable to the other party, but also to bring out independent facts and admissions which may be of substantial benefit to the cross-examiner.

Rogers, Expert Testimony (2d ed.), § 33, lays down the rule in the following language:

"The general rule has been stated in the preceding section to be, that on the direct examination of an expert witness it is error to include in the hypothetical question an assumed state of facts which the evidence in the case does not prove or tend to prove. But on the cross-examination of the witness counsel are not similarly restricted. On the cross-examination of any witness, whether an ordinary or an expert witness, counsel are entitled to ask any questions which tend to test the accuracy, veracity or credibility of the witness, or which tend to shake the credit of the witness by injur-

ing his character, although the facts concerning which he is questioned may be, as to the main issue, irrelevant and collateral. Consequently, on the cross-examination of a witness testifying as an expert, counsel may be permitted, for the purpose of testing the skill and accuracy of the witness, to ask him hypothetical questions pertinent to the inquiry whether the facts assumed in such questions have been testified to by witnesses or not."

In Lawson, Expert Evidence (2d. ed.), p. 274, the rule is laid down as follows:

"On cross-examination it is permissible, for the purpose of testing his skill and accuracy, to ask the witness hypothetical questions pertinent to the inquiry, assuming facts having no foundation in the evidence."

In the case of *Ewing v. Hatcher,* 175 Iowa 443, 154 N. W. 869, the court said:

"It is next contended that the court erred in permitting counsel for the plaintiff, on the cross-examination of Dr. Cheshire, to propound questions which, in their nature, were not proper to be propounded on cross-examination, in that the inquiry extended beyond the direct examination, and assumed facts which were not supported by the testimony. This objection might be good if the examination were in chief, but an entirely different rule obtains in the cross-examination of an expert. Where one is called as an expert, the cross-examination need not be confined to the matters drawn out on direct examination. Other matters, independent matters, may be inquired into for the purpose of testing his knowledge and skill as an expert."

In *Dilleber v. Home Life Ins. Co.,* 87 N. Y. 79, the court announced the rule as follows:

"Upon the cross-examination of an expert, counsel may not be so narrowly confined, but may, in putting hypothetical questions, assume any facts pertinent to the inquiry, whether testified to by witnesses or not, with the view of testing the skill and accuracy of the expert; but such cross-examination must, to some ex-

tent, be under the control of the trial court. In the hypothetical questions excluded on the trial of this case no fact was inserted which was not pertinent to the inquiry and based on some evidence in the case, and hence the questions were properly excluded."

In the case of *West Chicago S. R. Co. v. Fishman,* 169 Ill. 196, 48 N. E. 447, the court said:

"In the direct examination of an expert witness, the facts assumed in a hypothetical question should be only such as are fairly within the scope and range of the testimony. Upon cross-examination, any fact which, in the sound discretion of the court, is pertinent to the inquiry, whether testified to by anyone or not, may be assumed in a hypothetical question, with the view of testing the skill, learning or accuracy of the expert, or to ascertain the reasonableness or expose the unreasonableness of the opinion he has expressed to the jury."

In *Bever v. Spangler,* 93 Iowa 576, 61 N. W. 1072, the court said:

"The rule is well understood, we think, that experts may be cross-examined on purely imaginary and abstract questions, assuming facts and theories which have or have not foundation in the evidence, and that the allowance of all such questions rests in the sound discretion of the court. Where such discretion is fairly exercised, we will not interfere."

To the same effect are the following: *Williams v. Great Northern R. Co.,* 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 591; *Taylor v. Star Coal Co.,* 110 Iowa 40, 81 N. W. 249; *Louisville N. A. & C. R. Co. v. Falvey,* 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; 17 Cyc. 261; 5 Ency. Evidence, 632.

It must be conceded that the rule contended for by respondent is not without support in the authorities. *McDonald v. Rhode Island Co.,* 26 R. I. 467, 59 Atl. 391; *Mayhew v. Brislin,* 13 Ariz. 102, 108 Pac. 253; *Com-*

monwealth Bank v. Goodman, 128 Md. 542, 97 Atl. 1005; *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 South. 30, Ann. Cas. 1916D 1097; *Nichols v. Oregon S. L. R. Co.*, 25 Utah 240, 70 Pac. 996; *People v. Augsburry*, 97 N. Y. 501. We do not think the rule for which those cases stand tends to promote the central idea involved in all rules of evidence, which is to fairly lay before the court and jury the facts upon which the case is to be determined. The expert witness, because of his superior knowledge of the subject about which he is testifying, may be a very useful or a very misleading, or even dangerous, witness, and as to him the rules of cross-examination should be liberalized rather than restricted. We think the general practice in the trial courts of this state has been in accordance with the views we have announced and that such practice has grown up because it tended to bring about justice. Of course, the rule may be, and in fact often is, abused, but the trial court is always in position to stop the abuse. The rule is not to be condemned because of the inclination to abuse it, when the remedy is at hand.

The judgment is reversed and remanded for a new trial.

PARKER, C. J., MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16100. Department One. February 25, 1921.]

F. C. LEDOUX *et al., Respondents,* v. SEATTLE NORTH PACIFIC SHIPBUILDING COMPANY, *Appellant.*[1]

CONTRACTS (181) — EVIDENCE OF AGREEMENT — QUESTION FOR JURY. The positive testimony of a party that he had entered into an oral contract with defendant is sufficient to take the case to the jury.

CORPORATIONS (155, 162, 169) — REPRESENTATION — CONTRACTS — APPARENT AUTHORITY — EVIDENCE — SUFFICIENCY. Where the by-laws of a corporation do not authorize the secretary-treasurer to make a contract for the company, the company is not liable unless it was within the apparent authority which he assumed with the knowledge of the company; and the question is one for the jury where he was the officer in chief control of the company and to a large extent managed and directed extensive operations running into many millions of dollars, that he employed and placed on the pay roll two men as general and assistant superintendent for the construction of a plant at $300 per month, and further entered into an agreement with them for additional compensation of seven and one-half per cent of the construction cost, if the company should be successful.

CONTRACTS (12) — EVIDENCE OF AGREEMENT — REASONABLENESS. Upon an issue as to the terms of an oral contract for employment, it is admissible to prove the reasonable value of the services as tending to show the probability of the making of the contract.

WITNESSES (72, 79, 85) — CROSS-EXAMINATION — DISCRETION — LIMITATION — HYPOTHETICAL QUESTIONS. Where an expert has testified on direct examination that seven and one-half per cent of the cost was reasonable compensation for engineering services, it is error to exclude, on cross-examination, an answer to a hypothetical question which went into the details of the services performed under the contract; it not being discretionary to so limit the cross-examination.

APPEAL (395) — REVIEW — PRESUMPTIONS — ADMISSIBILITY OF EVIDENCE. The rule that error cannot be predicated on sustaining an objection to evidence, in the absence of an offer of proof as to what the answer would be, has no application to objections to proper cross-examination.

EVIDENCE (153) — PAROL EVIDENCE — RECEIPTS. Where a check was issued and accepted, reciting that it was "full settlement" of all expenses and services, it is competent to show that it was accepted on account only, under an oral agreement to make a complete settlement later.

[1]Reported in 195 Pac. 1006.

ACCORD AND SATISFACTION (2)—FORM OF AGREEMENT—RECEIPT IN FULL. Where there was an agreement to pay a certain sum on account, an accord and satisfaction is not shown by the sending and acceptance of a check for a less sum reciting that it was in full settlement.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 23, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

Shank, Belt & Fairbrook, for appellant.

Kelleran & Hannan and *John T. Casey,* for respondents.

BRIDGES, J.—By this action the respondents, as copartners, sought to recover of the appellant judgment in the sum of $37,504.08. Their right of recovery is based upon an alleged oral contract made by James F. Twohy, on behalf of the appellant, to the effect that the respondents were to take over the superintendence of the construction and completion of appellant's shipyard in the city of Seattle, Washington, and that for such services they were to be paid an amount equal to seven and one-half per cent of the cost of labor and materials used in such construction while they were in charge.

The appellant denied that such a contract had been entered into, and affirmatively plead that it had made a complete settlement with the respondents. There was a verdict for the total amount sued for. Upon the hearing of the appellant's motion for new trial, the court required the respondents to consent to a judgment in the sum of $22,980.83, otherwise the motion for new trial would be granted. The respondents consented to the reduction, and thereupon the motion for new trial was denied and a judgment entered in favor of the respondents for the sum last named. From this

judgment, the defendant has appealed and assigned a large number of errors.

It is first contended that there was not sufficient evidence of the contract sued upon to justify the court in submitting the case to the jury. All that need be said on this branch of the case is that Mr. Schacht, one of the respondents, positively testified that he had entered into the contract sued upon with Mr. Twohy, acting for the appellant. This was sufficient to take the question to the jury, notwithstanding Mr. Twohy denied he had made any such contract and notwithstanding appellant introduced much circumstantial evidence tending to show that the contract was unreasonable and was not made. It all amounts to a conflict in the testimony, which is for the jury.

But the appellant strenuously argues that, if such a contract was made by Mr. Twohy, it was unenforcible because he had no authority to make it on behalf of the appellant, and that the latter had done nothing to ratify it. It contends that Mr. Twohy was the secretary and treasurer of the appellant, and that he had no authority except such as the by-laws of the company expressly gave him, which were as follows:

"The secretary shall keep a fair and correct record of all the meetings of the board of trustees and stockholders, and of all other official business of the company. He shall have the custody of the corporate seal of the company and it shall be his duty to affix the same to all deeds, contracts, and other instruments of the company requiring a seal. He shall also sign with the president all deeds, contracts and other instruments.

"The treasurer shall be the custodian of the funds of the company and pay the same out by check properly countersigned as the board may prescribe and shall perform such other duties as may be prescribed for him from time to time. He shall give such bond as the board of trustees may from time to time require."

On the contrary, respondents contend that Mr. Twohy's whole power and authority was not obtained from the by-laws, and that appellant held him out to the world as having authority to make this contract and do many things which the by-laws did not expressly authorize him to do, and that he at all times held himself out as having such additional power and authority and exercised the same, all to the knowledge and with the consent of the corporation.

It has generally been held that, unless authority is expressly conferred on a secretary and treasurer or he is clothed with apparent authority by being entrusted with the management of the business or a part of it, he has no authority to make contracts on behalf of the company, and that a secretary and treasurer not having authority by virtue of his office to make such a contract, the corporation for which it is made cannot be held liable unless he has been held out by the corporation as having such authority, or unless he has exercised it with the knowledge and consent of the corporation. But this court in *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125, has held that:

"In this day and age when so large a part of the business of the commercial world is transacted through the agency of corporations, those dealing with them cannot be expected to prove the authority of corporate agents by producing a power of attorney under the corporate seal. They have a right to rely upon the apparent authority of those with whom they deal, and for acts done within the scope of that authority the corporation is bound."

It is manifest that the by-laws did not vest in the secretary and treasurer authority to make the contract here involved. We must, therefore, look to the evidence to see whether Mr. Twohy, with the knowledge

and consent of the corporation, held himself out as having authority for that purpose, or whether the corporation acknowledged him to have such authority.

As everyone knows, immediately after the United States entered the recent world war, the governmental authorities began insistently to press upon the people the great necessity for ships. Prior to the first of April, 1918, the Erickson Engineering Company, of Seattle, in answer to the request of the government, had made certain preparations for shipbuilding. Long before these preparations had been consummated and long before the shipyard had been constructed, Twohy Brothers, of which Mr. James F. Twohy was a stockholder and officer, became interested in the enterprise of the engineering company; and such early tentative arrangements were made as that the Twohy Brothers were to become half owners of the stock and property of the engineering company, and that company was to be re-organized and its name changed to the present appellant, or a new corporation formed to be known as the present appellant, to which the engineering company was to transfer all of its shipbuilding property. Mr. James F. Twohy was the principal representative of Twohy Brothers in all of these negotiations, and in fact throughout the shipbuilding period he continued to live in Seattle and to be the chief representative there of Twohy Brothers' interest in the appellant company and its business. It was largely through his efforts that the company was rapidly organized and financed and put in position and condition for the building of ships for the government. Twohy Brothers is a very large concern and are extensive contractors. There was testimony tending to show that, prior to the first of April, 1918, the building of the shipyard was not making very satisfactory progress. Mr. Schacht and the LeDouxs had previously

done contracting work for Twohy Brothers, and Mr. James F. Twohy seemed to have great confidence in their ability to push things along, and apparently desired to have them connected with the shipbuilding corporation then being organized.

It is conceded by the appellant that Mr. Schacht, on or about April 1, became the general superintendent for the construction of the plant, and that Mr. Frank LeDoux held a position immediately under him. It is amply proven, if not conceded, that the appellant agreed to pay these two men at the rate of three hundred dollars per month, and it is conceded, or at least amply proved, that such contract of employment as was made was made solely by and through Mr. Twohy. It was he who induced these men to come to Seattle; it was he who put them to work; it was he who put them on the payroll at three hundred dollars per month; it was he who made with respondents whatever contract was made. We have, then, a condition where it is proven, if not conceded, that Mr. Twohy, on behalf of the corporation, employed and had authority to employ these two men. In fact, his testimony was to the effect that he employed them, and that he caused them to be put on the payroll at three hundred dollars per month, and that it was understood between him and them that, if the company were successful, they were to get some additional compensation. The real question, then, is not as to the employment but as to the compensation to be paid.

It would seem that, if Mr. Twohy had authority to hire these men and to fix their compensation at three hundred dollars per month, with something in addition under certain circumstances, that that was, in itself, sufficient to carry the case to the jury on the question of whether Mr. Twohy had the authority to agree upon a greater compensation than that conceded by the

company. Another instance might be mentioned which lends strong support to the view that Mr. Twohy had the authority which is claimed by the respondents, and that is that after the shipbuilding was over the board of trustees of the appellant ordered that Mr. James F. Twohy be paid the sum of thirty thousand dollars in addition to the compensation theretofore paid him for his services to the company:

"for the reason that he was very largely instrumental in the original organization of the operating force of the company and has actively participated in the administration of the corporation through the entire operation of the company; and there was a tacit understanding at the commencement of the venture, among the officers and trustees of the company, that the executive officers should be paid an additional compensation in accordance with the success of the venture and commensurate with compensation afforded to like executives in similar enterprises."

It is true that Mr. Twohy had no official position with the company other than as its secretary and treasurer, and that the by-laws did not give him, as such, any authority to make the contract here sued on; but experience teaches us that it is very common for officers of a private corporation to exercise functions far beyond those formally given by the by-laws. So in this case, one cannot read the testimony without being imbued with the idea that Mr. Twohy, possibly aside from Mr. Erickson, was the very head and shoulders of the appellant and to a very large extent managed and directed its extensive operations, running into many millions of dollars. A very careful reading of the abstract of the testimony and parts of the statement of facts, which is more than seven hundred pages, thoroughly convinces us that there was ample testimony to carry the case to the jury on the question of

Mr. Twohy's authority on behalf of the appellant to make the contract which was sued on.

But appellant contends that, even if there was evidence to show a contract such as that sued on, there was nothing to show it was made with the plaintiff copartnership. We cannot sustain this contention. The plaintiff Schacht testified expressly that the contract was made for and on behalf of the copartnership, and that Mr. Twohy was fully advised of that fact. We do not think it necessary to discuss this question further than to say that a careful reading of the testimony convinces us that the court was right in submitting that question to the jury.

The respondents introduced the testimony of two or more witnesses tending to show the reasonable value of the services performed by them. It is claimed that this testimony was improperly received. It must be remembered that the real dispute in the case was as to the terms of the employment rather than as to the employment itself. Under these circumstances, it has many times been held by this and other courts that testimony is receivable which tends to show the reasonable value of the services. This is for the purpose of tending to show what the contract was. Testimony tending to show that the services of respondent were reasonably worth the sum they allege was agreed to be paid them, would tend to prove that there was such a contract; on the other hand, testimony tending to show that the amount contended for would be extortionate would tend to prove that the contract was not what they claimed it was. *Coey v. Darknell,* 25 Wash. 518, 65 Pac. 760; *Warwick v. Hitchings,* 50 Wash. 140, 96 Pac. 960; *Dimmick v. Collins,* 24 Wash. 78, 63 Pac. 1101; *Noyes v. Pugin,* 2 Wash. 653, 27 Pac. 548; *Robertson v. O'Neill,* 67 Wash. 121, 120 Pac. 884; *McCowen v.*

Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614; *Dickson v. Darnell*, 98 Wash. 301, 167 Pac. 937. We think the testimony was competent.

But a somewhat more difficult question arises in this connection. Mr. Thomas W. Baker was one of the witnesses by whom respondents sought to show the reasonable value of their services. On direct examination they asked him the following question:

"In this case, Mr. Baker, the plaintiffs, Mr. Schacht and LeDoux & LeDoux, claim that they have a contract, an agreement with the defendant, the Seattle North Pacific Construction Company, by the terms of which they claim that they were to receive seven and one-half per cent of the cost of labor and material that went into the construction of that shipyard during the time that they were on the work. I will ask you, from your experience as an engineer and contractor, Mr. Baker, if that is a reasonable sum for those services."

The witness gave an affirmative answer. On cross-examination, the witness was asked a certain hypothetical question to which objection was made and sustained. He was then asked the following question:

"Mr. Baker, I will state another hypothetical question to you. There is a shipbuilding plant in process of construction. It was established—the land was purchased in the fall of 1917; it originally embraced about fourteen acres; subsequently it was added to so that it embraced at the time I am going to make my inquiry of you, twenty-seven acres. We will assume that that shipbuilding plant is fairly represented on April 1, 1918, by the second photograph of plaintiff's exhibit 'I,' that was the condition of the plant on the 3rd day of April, 1918. On that day a man comes there, finds an organized lot of men, about two hundred and fifty men at work, the mold lofts up to the extent shown here, three and a half acres of the shipyard planked, as against four and a half total to be planked, and he finds foremen in charge of different departments; he makes no change in the office organization or in the

auditing department at all; he is a man who brings with him no organization; he has never been in the construction of shipbuilding plants at all before; he is a man who has had a high school education, not beyond that, and he spends two months on the plant in general charge of the work, giving orders and assuming to have control of the organization, he changes some of the employees or the heads of the departments and adds one or two others; he leaves; he has been there two months, during which time he had added from a hundred to one hundred and fifty additional laborers to the general number of employees, and assumes general charge of the plant. For such service as that, what would you say the man should receive per month?"

The court sustained an objection to this question, and we cannot avoid the conclusion that in so doing it erred. Both the question on direct and on cross-examination sought to disclose what would be a reasonable compensation for the services performed, or to be performed by the respondents. The only material difference between the two questions was that that asked on direct examination did not go into details concerning the amount of services performed or the length of time in their performance, while the question on cross-examination did go into these details. The court sustained the objection,

"because this witness was simply called to ascertain whether or not this was a reasonable contract, not whether this was reasonable compensation at all, but whether this was a reasonable contract. . . ."

The court was mistaken as to the purport of the direct examination. It did not call for an answer as to whether the contract sued upon was a reasonable one, but the direct answer sought was whether seven and one-half per cent would be a reasonable compensation. It would not have been proper to have asked the

witness whether the contract sued on was a reasonable one or whether reasonable men would have entered into it, because those were questions entirely for the jury. The proper question was the one asked, which was whether seven and one-half per cent would be a reasonable compensation; for, if the jury should believe such to be a reasonable compensation, it might conclude that reasonable men would have entered into the contract sued upon, and therefrom concluded that the contract was actually made. But, in any event, the cross-examination was along identical lines with the direct examination. It seems to us that, where a witness has testified that seven and one-half per cent was a reasonable compensation for services in superintending the construction of this plant, it was very material, indeed, for the opposite party to cross-examine on the particular work done by the respondents.

The respondents argue, however, that the question was improper because it did not include the services performed by the respondents other than Mr. Schacht. We do not think this position is tenable. The appellant's attorney had the right to conduct his cross-examination in any manner he saw fit. He had a right to separate the services performed by the several respondents and in that manner obtain an answer to the reasonable value of such services.

But it is contended that, in any event, cross-examination of this character is within the discretion of the trial court. In the case of *Levine v. Barry, ante* page 623, 195 Pac. 1003, we said:

"It is our view that the cross-examiner may rightfully propound hypothetical questions based entirely on conjectural facts for the purpose of testing the skill and knowledge of the witness, and, where he has not had an opportunity to present his proof as to the facts, his hypothetical question may be based on his conten-

tion of what the facts will be as they may be developed later by his testimony, for the purpose of throwing light on the facts as they may ultimately be submitted to the jury. The privilege of such character of cross-examination is a right which does not rest in the discretion of the court; but the extent to which such cross-examination shall go does rest in the discretion of the court."

The question to which objection was sustained was the first in the cross-examination which went to the merits of the witness' testimony in chief, and it cannot, therefore, be said that the examination had proceeded to such an extent as that the court might exercise a discretion. Indeed, it was not on this ground at all that the court sustained the objection.

But respondents assert that appellant is in no position to urge this objection, because it did not state to the court, or offer to prove, what answer the witness would make to the question. The position they take in this regard is clearly stated by this court in *Olive Co. v. Meek*, 91 Wash. 169, 157 Pac. 460, as follows:

"Error will never be presumed but must affirmatively appear from the record. Counsel for appellant did not follow up the ruling of the lower court by making any offer to prove, and in the absence of such an offer we cannot assume what the answer of the witness would have been. Hence it cannot be determined from the record that the ruling complained of was prejudicial."

This doctrine, however, can have no application to cross-examination. It was, of course, impossible for appellant to make any offer as to what this witness would testify because, he being a witness called by the respondents, it would have no way of knowing what answer the witness would make. In sustaining the objection to this cross-examination, the court was clearly in error.

But, it is contended that, if the contract sued upon was entered into, a complete settlement had been made. It appears that, after Mr. Schacht had been on the work for two months, some friction arose between him and the general manager, and he was requested to and did resign and leave the job. Mr. Frank LeDoux continued to work for an additional month, during which period he performed largely the services which had previously been performed by Mr. Schacht, and there is testimony to show that, when he left on July 1, the construction of the shipyard was well towards completion. According to Mr. Schacht, it was after he had quit that he had some talk with Mr. Twohy concerning compensation, the result of which was that Mr. Twohy, on August 13, by letter, sent Mr. Schacht the company's check for fourteen hundred dollars, stating that it was, "in settlement of your account to date." On the back of this check was the following:

"In full settlement to date of all expenses and services rendered, a/c Twohy Bros. Company and Seattle North Pacific Shipbuilding Company."

This check was accepted and cashed by Mr. Schacht and, over appellant's objection, he was permitted to testify that the check was not sent or received in full settlement. His testimony was to the effect that it was understood between him and Mr. Twohy that at that time there were no figures available upon which the compensation agreed on could be calculated, and that it was understood that this check for fourteen hundred dollars would be sent him for the purpose of giving him some immediate cash which he needed, and that a complete settlement would be had later. He further testified, over objection, that he did not read the endorsement on the check and did not know it was there until after the commencement of this suit.

We think this testimony was admissible. Whether there has been an accord and satisfaction is generally a question of fact, and if this check was sent with the understanding that it was only on account, it could not be considered as payment in full, notwithstanding any endorsement to that effect on the back of the check. It was, of course, for the jury to determine whether the check was agreed to be sent on account. The general rule is that, where a debtor sends to his creditor a check for the amount he is willing to pay, and at that time informs the creditor that he intends the check to be considered as full payment, then, by the acceptance and cashing of the check, the creditor agrees to the settlement and cannot thereafter seek additional compensation. But that rule is inapplicable to the situation here as testified to by Mr. Schacht. Where there is an agreement that a certain sum shall be paid on account and not in full settlement, the sending of a check which shows that it is in full settlement does not, as a matter of law, accomplish an accord and satisfaction. *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372; *Phelps Lumber Co. v. Bradford-Kennedy Co.*, 96 Wash. 503, 165 Pac. 376.

We think, therefore, that the court properly received this testimony. In this connection it is further contended that the court's instruction on this matter was erroneous. We do not think it necessary to present this instruction at length. It followed the law as we have here announced it to be.

It is not likely the other questions discussed in the briefs will arise in a retrial, and for that reason we do not deem it necessary to consider them. For the error hereinbefore pointed out, the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., MACKINTOSH, HOLCOMB, and FULLERTON, JJ., concur.

[No. 16292. Department Two. February 28, 1921.]

THE STATE OF WASHINGTON, *on the Relation of the City of Seattle, Appellant,* v. PUBLIC SERVICE COMMISSION *et al., Respondents.*[1]

GAS (3)—CHARGES—PUBLIC SERVICE COMMISSION — FINDINGS—REVIEW. The findings of the public service commission in fixing gas rates will not be disturbed by the courts in the absence of a showing of capriciousness or arbitrary action; and none appears from the fact that statistics and tabulations from the company's books were used, where the report of the accounting department of the commission showed substantially the same condition.

SAME. Findings of the public service commission as to the reasonableness of rates will not be disturbed because of a consideration of reports made and comparative figures and statements, not regularly introduced in evidence, where the finding was not based thereon and was supported by other substantial evidence.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered November 8, 1920, sustaining upon appeal the decision of the public service commission fixing gas rates. Affirmed.

Walter F. Meier, Thomas J. L. Kennedy, and *J. A. Newton,* for appellant.

Poe & Falknor, for respondent Seattle Lighting Company.

The Attorney General and *Raymond W. Clifford,* for respondent Public Service Commission.

MAIN, J.—The respondent Seattle Lighting Company is a corporation engaged in the manufacture, distribution and sale of gas in the city of Seattle under a franchise granted by that city. On the 26th day of November, 1919, the company filed with the state public service commission a schedule of rates to be charged. This tariff was to be effective as of February 1, 1920, but

[1]Reported in 195 Pac. 1015.

was suspended by the commission pending an investigation and hearing. On the 16th day of January, 1920, the city of Seattle filed with the commission a complaint alleging that the proposed rates were unjust, unfair and unreasonable. The lighting company denied the charges in the complaint and the matter came on for hearing before the commission at Seattle on the 20th or 21st day of February, 1920. At this hearing the city was represented by one of the officers of its legal department. Testimony was offered by the lighting company, by the city and by the commission.

After the hearing, the commission found that, on the 30th day of June, 1914, the lighting company's property devoted to a public use had been found to be valued at $9,126,883 as a basis for rate making. That, between the 30th day of June, 1914, and December 31, 1919, there had been added to the value of the lighting company's property $1,348,286.24. That the net additions during the year 1919 were $212,459.56. That the value of the lighting company's plants as a basis for rate making for the year 1919 was $10,368,939.46. That this plant value was used as a rate basis in determining the amount upon which the respondent was, during the year 1919, entitled to earn a reasonable and fair return. That, based upon this average value of the plant, $10,368,939.46, and after deducting all operating expenses and taxes and allowing for an annual depreciation of 2.18 per cent, the commission found that, in the year 1919, the respondent earned under its present rates 1.91 per cent. That, if non-operating income and profits on sales of merchandise and rents from real estate and buildings were disallowed, together with adjustments and bad debts, the rate of return would be 1.82 per cent. That, using the value of the plant specified, based upon the 1919 business, the commission found that after paying all operating expenses and

taxes and allowing for an annual depreciation of 2.18 per cent, the lighting company would earn under the proposed rates 5.34 per cent annually. That should there be added non-operating income and deducted profits on merchandise sales and jobbing, rents derived from real estate and buildings, and allowance for discounts, the rate of return would be 5.25 per cent. That the proposed rates as set forth in the lighting company's tariff under consideration were not unjust, unfair, unreasonable or unlawful nor more than sufficient.

From the order entered sustaining the tariff, the city took the matter before the superior court of Thurston county for review, and from an adverse decision there, appeals to this court.

If we have gathered the argument of the city's brief correctly, there are two main contentions. First, that the evidence does not sustain the findings of the commission and that improper evidence was considered. As to the sufficiency of the evidence to sustain the finding, the rule is that, so long as the commission acts within its powers, its findings when supported by substantial evidence will not be disturbed by the courts in the absence of a showing of capriciousness or arbitrary action. *Interstate Commerce Comm. v. Louisville & Nashville R. Co.*, 227 U. S. 88; *Interstate Commerce Comm. v. Union Pac. R. Co.*, 222 U. S. 541, 56 Law Ed. 308; *People ex rel. New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 Law Ed. 337. This is the rule applied by the Federal supreme court to the findings of the interstate commission, and there is no reason why the same rule should not be applied to the findings of the public utilities commission acting under state law.

Upon the hearing, detailed reports and tables, showing the respondent's financial condition, which had been prepared by the engineering and accounting depart-

ments of the public service commission, were introduced in evidence. The lighting company introduced similar evidence prepared by its expert, together with the oral testimony of the person preparing the report. There seems to be some contention that the report offered by the lighting company is not the best evidence and should therefore not be considered by the commission. There are two answers at least to this position. One is that the evidence was not objected to, and the other that, in any event, it was competent for the purpose of showing the conditions under which the lighting company was operating its business. *Rowland v. St. Louis & S. F. R. Co.*, 244 U. S. 106; *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U. S. 117.

In order to get the facts concerning the operation of the business before the commission, it was necessary to make statistics and tabulations from the books of the company. No other practical way of presenting this information is pointed out. As to the report prepared by the commission's engineering and accounting departments, it was admitted by the city's representative to be a truthful statement in so far as it was possible to get such a statement from the company's books. There was an implied insinuation that the company might be keeping a duplicate set of books, but there is not evidence of this and the impracticability of such a thing is apparent. The report prepared by the engineering and accounting department of the commission showed substantially the same condition of the company as did the report and oral testimony presented by the lighting company. If, however, the company's evidence should be disregarded entirely, there is substantial evidence in the report of the commission's engineering and accounting dpartments to sustain the finding. All must realize that, if a public utility is to

continue to exist and perform its functions, it must have sufficient rates.

The second point is that the commission considered improper testimony. Upon the hearing the city's evidence largely went to a comparison of the rates charged in Portland, San Francisco and Los Angeles with those in Seattle. None of the witnesses appearing had made a detailed investigation of any of the plants mentioned and they did not show sufficient knowledge of the practical and actual conditions under which the gas plants in those cities were operated to entitle their testimony to much weight. It is obvious that, if a comparison of gas plants is attempted, there are a number of factors that enter into the consideration, such as the different method of manufacture, different characteristics in the distributing system, local conditions affecting supply and price of gas making materials, different consumption characteristics, and so forth.

The evidence offered by the city tended to show the wage scale of the respective cities, the price of gas or oil and similar matters. This was only a superficial showing. At the conclusion of the hearing, however, the commission thought it best to cause its engineer to visit the cities mentioned and investigate the conditions. This was done and in its opinion the committee refers to this investigation and the report, and concludes that the result of the investigation showed that comparative figures and statements alone were not sufficient to warrant a holding that the proposed rates were unjust, unfair, unreasonable or more than sufficient. It is this report about which the city complains, its position being that the examining expert should have been placed upon the stand to testify with an opportunity for cross-examination.

For the purpose of this case, it will be assumed, but not decided, that, when the commission has under con-

sideration the matter of rates, its findings should be based upon the proof submitted. The commission did not base any findings upon the report of its engineer other than the finding that such report was not sufficient to warrant a holding that the proposed rates were unjust, unfair or unreasonable. Without this report, as already pointed out, there was substantial evidence to sustain the finding of the commission. Had the commission's finding been necessarily based upon the report of its engineer, a different question would be presented.

The judgment will be affirmed.

PARKER, C. J., TOLMAN, and MITCHELL, JJ., concur.

[No. 16114. Department Two. March 1, 1921.]

FELIX LE MARINEL *et al.*, *Respondents*, v. JOHN F. BACH *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (3)—CONTRACT—CONSTRUCTION. A note at the foot of a contract for the trade of lands requiring delivery of possession and marketable title does not impose any burden other than the law would require.

SAME (10)—CONTRACT—VALIDITY—FORM—PARTIES. Informalities in referring to the parties to a trade as "you" and "our," do not invalidate a contract for a trade, where the names of the parties clearly appear in their signatures, making and accepting the proposition.

FRAUDS, STATUTE OF (58)—ORAL EVIDENCE—IDENTIFYING CONTRACT REFERRED TO. A written contract is not within the statute of frauds because of the necessity to resort to oral testimony for the purpose of identifying contracts had on the land and referred to, and not to establish any of its essential terms.

SPECIFIC PERFORMANCE (13-2) — CONTRACTS ENFORCEABLE — COMPLETENESS. Specific performance of a contract for the trade of lands will not be denied for lack of completeness, in that interest was to be computed, where the amount was ascertainable by the computation.

[1]Reported in 196 Pac. 22.

SAME (28) — SUFFICIENCY OF PERFORMANCE OR TENDER. Specific performance of a trade of lands should not fail on account of an insufficient tender of performance, where the defendants based their claim in the first instance on the ground of fraud; since the court may permit a sufficient tender to be made.

SAME (17)—CONTRACTS ENFORCEABLE—POSSESSION. Specific performance of a trade of lands does not necessarily fail because the parties were not put in possession of the properties.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered April 29, 1920, upon findings in favor of the plaintiffs, in an action for specific performance. Affirmed.

Cordiner & Cordiner and *Hanna, Miller & Hanna,* for appellants.

W. C. Losey and *J. N. Pickerell,* for respondents.

MAIN, J.—This action was brought for the purpose of enforcing the specific performance of a written contract for the exchange of real estate. The defendants resisted the action, claiming that the contract was not sufficient, and further, that they were induced to enter into it by fraudulent representation. The cause was tried to the court without a jury and resulted in findings of fact, conclusions of law and a judgment sustaining the right of the plaintiffs to recover. From this judgment, the defendants appeal.

The respondents are husband and wife and were the owners of a farm consisting of approximately four hundred acres near the town of Cheney, in Spokane county. The appellants are husband and wife and were the owners of a farm consisting of approximately four hundred and forty acres in Whitman county. After certain negotiations, the following contract, dated April 5, 1919, was entered into between the parties for the exchange of the properties.

"For and in consideration of Five Dollars, the receipt of which is hereby acknowledged, we the undersigned make you the following proposition:

"We will give you our farm consisting of 440 acres, and described as follows: The North-east quarter, and all of the South-west quarter; East half of North-west quarter, and the South-west quarter of North-west quarter, of Section Thirty-four (34), all in Township Twenty (20), Range Forty-one (41), E. W. M. This farm will be subject to a mortgage of Fifteen Thousand ($15,000.00) Dollars, which you are to assume. You are further to give us a difference of Six Thousand ($6,000) Dollars, in bankable securities, of some kind, to be approved by us, or in case we do not approve of said securities, we hereby agree to accept the cash instead of securities. You are further to give us a certain tract of land consisting of 400 acres located about three miles from Cheney, and which I have inspected and approved of and described as follows: The South-east quarter, and the East half of North-east quarter, Section Twenty-nine (29) also South half of North-west quarter, and the North-half of South-west quarter, of Section Twenty-eight (28), located in Twp. Twenty-three (23), Range Forty-one (41) E. W. M. and containing 400 acres, less rail-road right-of-way. We understand that this land is subject to an incumbrance of Eleven Thousand Five Hundred ($11,500) Dollars, which we will assume. We understand this incumbrance is in the shape of a contract, Fifteen Hundred ($1500.00) Dollars of it to be paid either November 1, 1919, or November 1, 1920, and the balance of Ten Thousand ($10,000) Dollars is to be a mortgage running for three years from the first day of May 1919, at 6%. However, at present you are to give us a contract for deed, and in case we should demand an extension of the Fifteen Hundred ($1500) Dollars, which is payable November 1, 1919, for another year, and make it payable November 1, 1920. You are to arrange the contract in such a manner that said extension will be granted. We want the privilege of paying this indebtedness on or before the three years time. Interest on the mortgages are to be computed on both

our places, and adjusted when deal is closed. Taxes to be paid on your place, as well as our when trade is made. We will give you 20 days from this first day of April 1919 to accept this proposition. Dated this 1st day of April 1919. John F. Bach
"Jean C. Bach."

"Executed in the presence of C. C. Chandler.

"We the undersigned hereby accept your proposition. Dated this 5th of April 1919.
"Felix Le Marinel.
"Margaret Le Marinel.

"This note is part and parcel of original proposition and contract. It being further agreed that LeMarinel and wife, are to deliver possession to Bach and wife, and Bach and wife are to deliver their place to LeMarinel, subject to lease of grain rent, being two-fifths in warehouse and $100.00 per annum. Marketable titles are to be given by both parties, and ninety days time to be given to perfect same in case of any flaw appearing. J. F. Bach
"Felix LeMarinel."

"In force when date of acceptance is herein filled by LeMarinel and wife."

On the 19th day of April, the appellant John F. Bach and the respondent Felix LeMarinel visited the Spokane county farm, and possession was thereupon delivered to Bach. Following this, they visited the Whitman county farm, and possession was delivered by Bach to LeMarinel. Each of the farms at the time was occupied by a tenant. LeMarinel arranged with his tenant to leave the place or be subject in his future relations thereto to Bach. Bach directed the tenants on his land to pay the rent which would accrue under the unexpired lease to LeMarinel. On the third day of May, 1919, a supplemental contract was entered into which was signed only by Bach and LeMarinel, but was not signed by the respective wives. This contract recites the payment of one thousand dollars by LeMarinel to Bach, and contains other provisions which have a tendency

to modify the original contract in some particulars in the interest of the appellants. On May 8, 1919, Bach wrote LeMarinel a letter in which he stated that the agreement relative to the exchange of the farms was terminated;

"for the reason and upon the grounds that your land is not as you represented it to me. Hence enclosed please find my check for $5 for money paid by you to me and also your check for $1000 which you delivered to me on the 3rd inst."

The respondents declined to recognize the termination of the contract, tendered the performance of the terms which had been imposed upon them, and brought this action for the purpose of enforcing specific performance.

Without discussion, it will be assumed that the contract is one which is covered by the statute of frauds and that all the essential terms thereof must be in the writing and that, the property being community property, the signature of the wives to the contract was a necessary requirement. The first point made by the appellant is that the note on the contract below the signature of LeMarinel and wife was not there at the time it was signed by Mrs. Bach. Upon this question, the evidence is conflicting, but seems to us to establish the fact that the note was upon the contract at the time in question. In any event, it does not impose any burdens upon the appellants in addition to those specified in the contract proper other than the law would require when the deal was closed. It provides for the delivery of possession and for marketable titles. The provision with reference to LeMarinel taking the Whitman county land subject to the lease, grain rent, etc., was for the benefit of the appellants, and if it modified the contract would not furnish a reason for them to refuse performance.

The second point is that the contract was defective because it is said that it does not name the respondents as parties thereto. The contract is somewhat informally drawn and purports to be a proposition coming from the appellants. After reciting the consideration, it says "we will give 'you' our farm," and so forth. The argument is that oral testimony is necessary to show who is meant by "you," and therefore resort must be had to that kind of evidence to sustain an essential term of the contract. The fallacy of this argument is in the fact that it takes no account of the signatures of LeMarinel and wife which appear upon the contract after the recital that they accept the proposition which was made by the appellants. The names of the parties to the contract plainly appear thereon and there is no merit in the contention that it is necessary to resort to oral testimony to determine who is meant by "you." The case of *Carrick v. Mincke*, 60 Mo. App. 140, is distinguishable. There, there was nothing on the face of the writing itself to identify the person referred to therein as "you." Here the signatures furnish the identification.

The next point is that the contract is partly in writing and partly oral, and therefore under the statute of frauds is an oral contract. It will be admitted that if the contract was partly in writing and partly oral under the statute of frauds, it would be an oral contract. In other words, if it were necessary to resort to oral testimony for the purpose of establishing any of the essential terms, the contract is oral.

It is claimed that the contract was partly oral because it is necessary to resort to oral testimony to identify the contract under which the respondents held their Spokane county land and which contract is referred to in the contract between the parties to this

action. Oral evidence may be introduced to show the situation of the parties and the circumstances attendant upon the transaction for the purpose of applying the contract to the subject-matter and of showing the connection of different writings constituting the memorandum with one another. *Lee v. Butler,* 167 Mass. 426, 46 N. E. 52, 57 Am. St. 466; *Shelinsky v. Foster,* 87 Conn. 90, 87 Atl. 35, Ann. Cas. 1914C 1007. Other cases might be cited, but the rule seems so well settled that the multiplication of authorities is hardly necessary. The evidence in this case offered and received by the court was within the recognized rule. It was for the purpose of identifying the contract which the respondents had upon their land and which were referred to in the writing above set out.

The next point is that the contract relied upon is not complete and that some of its terms are left to be settled by future negotiations. It is undoubtedly the rule that courts of equity will not undertake to enforce a specific performance of an agreement unless its terms are such that they cannot be reasonably misunderstood. The contract recites that interest on the mortgages is to be computed. The land of the appellants was subject to a mortgage indebtedness of fifteen thousand dollars and that of the respondents to eleven thousand five hundred dollars. The price or consideration to be paid is an essential ingredient of the contract, and if it is neither ascertained nor rendered ascertainable, the contract is void if incomplete and incapable of enforcement. *Huston v. Harrington,* 58 Wash. 51, 107 Pac. 874. The interest matter referred to in the contract was one which was ascertainable by the computation and does not fall within the rule that the contract failed in an essential ingredient in that it did not fix the price. The case of

Leslie v. Mathwig, 131 Minn. 159, 154 N. W. 951, is not in point. There the contract, after fixing the purchase price and specifying certain initial payments, provided that the balance of the purchase price was to be arranged by adjustment of mortgages. There was nothing to show the rate of interest which the mortgages were to bear or the time that they were to run. These were matters which could not be made certain by computation, but in order to ascertain them, resort to oral testimony would have been necessary.

The tender of performance made on the part of respondents included an assignment of the contract which they held from one Taylor and consent on Taylor's part to the assignment as well as a tender of the six thousand dollars which the respondents were to pay the appellants. The appellants did not refuse to perform because the contract tendered was not such as they thought they were entitled to, but they based their claim in the first instance upon the alleged fact that the contract had been induced by fraud. If the court should be of the view that the contract to be tendered was different from that offered by the respondents, it would not follow that the action would absolutely fail for this reason, because, this being an equity action, the parties would undoubtedly be given the privilege of tendering such a contract as the court considered that they were under obligations to do.

The next point is that the contract was induced by fraud and that therefore it will not be specifically enforced. It may be admitted that, if the court should be of the view that the contract was tainted with fraud, it would not decree specific performance thereof. Upon the question as to whether there were fraudulent representations, the evidence is conflicting. The trial court apparently was of the view that the charge of

fraud had not been sustained, otherwise specific performance would not have been decreed. After reading the evidence and giving it careful consideration, we are of the opinion that the charge of fraud is not sustained, and that the only reason for failing to go forward with the contract was that the appellants became convinced that they had not made a good trade.

In the briefs some considerable space is devoted to the question whether the appellants were placed in possession of the Spokane county land and the respondents in possession of the Whitman county land. As we view the case, we attach no special importance to this question because, if it be assumed that possession was not actually given, it would not follow that the respondents were not entitled to the specific performance of their contract.

The judgment will be affirmed.

HOLCOMB, MOUNT, MITCHELL, and TOLMAN, JJ., concur.

[No. 15927. Department One. March 2, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. P. J. MULLER, *Appellant*.[1]

CRIMINAL LAW (36)—VENUE—CHANGE—LOCAL PREJUDICE. Prejudicial error cannot be predicated on denying a motion for change of venue on account of local prejudice, where both sides were permitted to excuse any juror living in localities where there was a possibility of prejudice.

JURY (62) — SELECTION — OBJECTIONS AND EXCEPTIONS. Error in denying a challenge to a juror cannot be assigned where it does not appear that he was not subsequently removed by a peremptory challenge, or that accused exhausted all his challenges.

CRIMINAL LAW (224) — TRIAL — COMPELLING CALLING OF WITNESS. The state is not required to call all the witnesses indorsed on the information, and error cannot be assigned thereon.

CRIMINAL LAW (388)—APPEAL—NECESSITY OF OBJECTIONS—ARGUMENTS OF COUNSEL. Error cannot be assigned upon improper conduct of counsel for the state in his address to the jury where no objection was made or any request to instruct the jury to disregard it.

Appeal from a judgment of the superior court for Island county, Alston, J., entered November 25, 1919, upon a trial and conviction of rape. Affirmed.

E. C. Dailey and *A. E. Dailey*, for appellant.

John C. Richards, for respondent.

MACKINTOSH, J.—The defendant appeals from a conviction of rape.

The first error assigned is that the court should have granted his motion for a change of venue on the ground of local prejudice. This is a matter which the court determined upon a showing both in support of the change and in opposition thereto, and we find nothing in the record to justify a conclusion other than that arrived at by the trial court. The trial court, in denying the

[1]Reported in 195 Pac. 1047.

motion, permitted both the state and the defendant to excuse any person coming into the jury box who might live in certain localities where there was a possibility of prejudice against the defendant. We do not see how the appellant can take advantage of this as error, for the record does not show any such talesmen were called into the box.

It is next urged that the court erred in denying appellant's challenge to the juror Coupe. While we might believe from reading the examination of this juror that the challenge for cause should have been sustained, in the record it nowhere appears that the juror was not subsequently removed by appellant's peremptory challenge, or that the appellant exhausted all his peremptory challenges. Error is not to be presumed, and it not appearing that the denial of the challenge for cause resulted in any prejudice to the appellant, the point must be resolved against him. *State v. Moody,* 7 Wash. 395, 35 Pac. 132; *State v. Rutten,* 13 Wash. 203, 43 Pac. 30; *State v. Carey,* 15 Wash. 549, 46 Pac. 1050; *State v. McCann,* 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *State v. Stentz,* 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Champoux,* 33 Wash. 339, 74 Pac. 557.

Error is also predicated upon the drawing of the special venire. The venire was drawn in conformity with the requirements of the code.

Two instructions given by the court are claimed by the appellant to have been erroneous. One of these instructions advised the jury that it might disregard any statements made by counsel which were not supported by the evidence, and the other instruction defined reasonable doubt. These instructions, most critically examined, reveal no divergence from correct statements of the law to which they attempted to direct the jury's attention.

It is next urged that there was error in the fact that the state did not call a doctor whose name had been endorsed upon the information as a witness. The doctor had been subpœnaed at the time of the trial, but the state excused him without using him as a witness. We know of no rule which compels either party to litigation to call all the witnesses whom they have subpœnaed, nor is the state, by the fact that its attorney endorsed the names of witnesses on the information, thereby obligated to use each and every one of the witnesses so named. When the attorney representing the state has introduced that which, in his mind, is sufficient to establish the case he need proceed no farther.

It is finally urged that counsel for the state was guilty of misconduct in his address to the jury. The record does not show that the remarks complained of were of such serious import as to justify their being called erroneous, and, furthermore, no proper objection was made to them, nor was the court asked to instruct the jury to disregard them.

On the whole record, we are satisfied the defendant had a fair and impartial trial, and was properly convicted of a crime proved beyond all reasonable doubt by competent evidence. Judgment affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and FULLERTON, JJ., concur.

[No. 16236. Department One. March 2, 1921.]

THE STATE OF WASHINGTON, *on the Relation of M. C. Ballard et al., Plaintiff*, v. THE SUPERIOR COURT FOR KITTITAS COUNTY, *Respondent.*[1]

EMINENT DOMAIN (39)—NECESSITY FOR CONDEMNATION—FEASIBILITY OF OTHER ROUTE—EVIDENCE—SUFFICIENCY. A reasonable necessity for the condemnation of a right of way for an irrigation ditch is shown, as against a claim of another feasible route, where it appears that the cost of such other route would be entirely disproportionate to the benefits and was impracticable.

Application filed in the supreme court November 4, 1920, for a writ of certiorari to review the order of the superior court for Kittitas county, Davidson, J., entered November 4, 1920, adjudging a public use and necessity in condemnation proceedings, after a trial to the court. Denied.

Geo. E. Canfield, for relators.

G. P. Short, for respondent.

MACKINTOSH, J.—Relators are applying for a writ of review of an order of necessity made in a condemnation proceeding. They are the owners of lands in Kittitas county, irrigated by a ditch some 3,678 feet in length, known as the Lund ditch, which crosses relators' land. Richards owns lands adjoining the relators' land, some of which is irrigated by a ditch known as the Richards' ditch, which starts at a common point with the Lund ditch, and crosses relators' land at a distance of eight hundred feet north of the Lund ditch. Richards seeks to condemn a right to extend the Lund ditch three hundred and seventy feet beyond its present terminus and through the land of the relators to his own land, and to carry fifty inches of water

[1]Reported in 195 Pac. 1051.

through the Lund ditch to his land, and to acquire the right of user in the Lund ditch throughout its length for that quantity of water. That portion of Richards' land which is under the Richards' ditch, is separated from the land which he is now seeking to have put under water in this proceeding.

On the hearing upon the petition, the court entered an order of necessity and granted Richards the privilege sought. It is the claim of the relators that Richards now has a feasible route and means of conveying fifty inches of water from his own ditch; and, secondly, that to allow Richards to acquire flowage rights in the Lund ditch would work an irreparable injury, and destroy some fifteen to twenty-five acres of relators' cultivated land.

The testimony shows that, in order to get the requisite amount of water to the land which Richards is now seeking to have irrigated, it would be necessary, if the water were taken through the Richards ditch, to acquire a right of way for flume for over two thousand feet, and that the flume would be elevated a distance of from ten to twenty feet above the ground. The testimony shows that the cost of the flume would be entirely disproportionate to the benefit, and that the plan for this and other reasons would hardly be feasible or practicable.

We are certain from the testimony that a reasonable necessity exists for the use of the land sought to be condemned, and that Richards, in the selection of the route which he is seeking, has exercised no bad faith, oppression or abuse of power. *State ex rel. Stephens v. Superior Court,* 111 Wash. 205, 190 Pac. 234; *State ex rel. Lincoln v. Superior Court,* 111 Wash. 615, 191 Pac. 805; *State ex rel. Grays Harbor Logging Co. v. Superior Court,* 82 Wash. 503, 144 Pac. 722.

Upon the second point, there is some testimony that the putting of the fifty inches of water through the Lund ditch might result in the injury of relators' irrigated land by seepage. This testimony, however, was more than overcome by Richards' witnesses, who testified that no such untoward result would flow therefrom. They testified that there was no sub-irrigation and that the only inconvenience the relators would suffer would be that which comes from the fact that they would no longer have exclusive control of the Lund ditch. The trial court heard the testimony and saw the witnesses, and determined that a reasonable necessity existed for the condemnation, and was satisfied that the route selected was the most feasible one.

The jury will be called upon to determine the damages, and if, before that jury, the relators can establish by their proof that their land will be damaged as they claim, the jury will return a verdict in conformity with the evidence before it; and if the relators establish their contention, it will result in an award in such amount as probably to compel Richards to abandon his proceeding.

The writ will be denied.

PARKER, C. J., HOLCOMB, BRIDGES, and FULLERTON, JJ., concur.

[No. 16228. Department Two. March 2, 1921.]

DANIEL SALZER, *Appellant*, v. JOHN MANFREDI, *Respondent*.[1]

LANDLORD AND TENANT (31)—LEASE—OPTION FOR RENEWAL—NOTICE—CONTINUING POSSESSION. Where a lease gave the right to a renewal or an extension without providing for the giving of any notice to the lessor, the lessee is entitled to the benefit of an extension or renewal by continuing in possession at the end of the original term, without giving formal notice of intention to exercise the option, provided such possession is indicative of an exercise of the option and nothing is done to forfeit his rights.

SAME (31). Where a lease gave a single option for renewal for from one to five years, as the lessee might elect, and he exercised the option merely by holding over without electing as to the term, the law will presume that he elected a renewal for the shortest term specified, or one year.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered July 27, 1920, upon findings in favor of the defendant, in an action of unlawful detainer, tried to the court. Reversed.

A. E. Rice and *W. H. Cameron*, for appellant.

C. D. Cunningham, for respondent.

TOLMAN, J.—On April 27, 1918, appellant as lessor entered into a written lease with respondent as lessee by which he demised a certain store building in the city of Centralia, for the term of one year, at a monthly rental of fifteen dollars. The lease contained the following provisions:

"It is understood and agreed by the parties to this lease that the lessee is granted the right and privilege at the end of the term of this lease to rent and lease the same premises for five years more, or as many years as he may desire to lease not to exceed five years

[1]Reported in 195 Pac. 1046.

in all; provided, however, that the lessor herein desires to rent the said premises."

Respondent held possession through the year, and thereafter continued in possession, paying the rental stipulated in the lease until November, 1919, during which month he was informed by appellant that, if he desired to continue in possession, he must pay a rental of twenty-five dollars per month; but notwithstanding such oral notice, appellant continued to accept fifteen dollars monthly as rent for the premises for several months thereafter. In February, 1919, appellant refused to accept the fifteen dollars monthly payment and brought an action in unlawful detainer to recover possession of the premises, which action he thereafter voluntarily dismissed.

On March 26, 1919, appellant caused to be served upon respondent a written notice to the effect that the tenancy was thereby terminated, and requiring the respondent to vacate on or before the first day of May, 1920. That notice being uncomplied with, appellant on May 13, 1920, brought this action in unlawful detainer to recover possession of the premises. From a judgment denying him relief, he appeals.

Three questions are here presented: (1) Is the option for a new lease enforcible by either party against the other without his consent thereto? (2) If so, did it require affirmative action on the part of the lessee, other than continued possession and the payment of rents at and after the termination of the first year, before the renewal would take effect? (3) If a renewal was effected by holding over and the payment of rent, would such renewal be for more than one year?

In view of the facts disclosed and the conclusions we have reached, the first question is now a moot question only, and need not be here considered; though, under the familiar rule that doubtful provisions must

be construed in favor of the lessee, we would no doubt be inclined to an affirmative answer, if an answer were necessary. The second question is answered in the negative by our holding in *Henry v. Bruhn & Henry, Inc.*, 110 Wash. 321, 188 Pac. 506, and need not be further discussed. Our disposition of the case therefore depends upon the answer to the third question.

The original lease expired by its terms on May 1, 1919. The notice to quit, upon which this action is based, called for a surrender of the premises on May 1, 1920, or just one year thereafter. The option in the lease gives the tenant the right to renew the lease for one, two, three, four or five years, as he might elect, but it must be noted that it is but a single option to be exercised at the end of the term as originally granted. Nothing having been said or done by the tenant to indicate his intention in holding over save to remain in possession and pay rent, it is for the law to say whether he thereby elected to take the longest or the shortest term which the option accords him.

But on this question of which option will be deemed to be exercised, the authorities are very meager. So far as they have come to our attention, however, they all hold one way, i. e., that the tenant will be held to have elected to take the shortest term. In none of the cases is the question reasoned to any extent nor the principles upon which it rests, if any, clearly set forth, and perhaps, if there was authority for the contrary view, we might incline to it, but in the absence of such authority, we deem it the better course to follow the adjudicated cases, which are: *Lanham v. McWilliams*, 6 Ga. App. 85, 64 S. E. 294; *Falley v. Giles*, 29 Ind. 114; *Trustees, etc. v. Hoyle*, 79 Misc. Rep. 301, 139 N. Y. Supp. 1098.

It must be borne in mind that the provisions of the lease in question give but one option to renew, though

for different terms, and such an option may be exercised but once (*Falley v. Giles, supra*); and since the option was exercised only by holding over after the original term had expired, and the law assumes under such circumstances that the option was exercised for the least term, therefore, the renewal term has been fully enjoyed by the respondent and it expired with the maturity of the notice to vacate. Therefore appellant was, on May 1, 1920, and thereafter, entitled to possession.

The judgment appealed from is reversed and the cause remanded for further proceedings in harmony with these views.

PARKER, C. J., MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 16232. Department Two. March 2, 1921.]

NORTHUP-HAGE LUMBER COMPANY, *Appellant*, v. EUREKA CEDAR LUMBER & SHINGLE COMPANY, *Respondent*.[1]

SALES (29)—CONTRACT—CONSTRUCTION — SUBJECT-MATTER — QUANTITY AND ASCERTAINMENT. A contract to sell a mill's "entire output" of lath up to a specified date, to be air or kiln dried, means the output of air or kiln dried lath, where the kiln capacity was limited to the knowledge of the parties, and does not include lath cut which could not be dried within the period stipulated.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered July 20, 1920, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Douglas & Schramm, for appellant.

W. H. Abel, for respondent.

[1]Reported in 195 Pac. 1052.

TOLMAN, J.—This is an action to recover damages for an alleged breach of a written contract for the purchase and sale of lath. From a judgment denying recovery, the plaintiff appeals.

The principal controversy is over the construction to be placed upon the contract, which reads as follows:

Purchase Order
NORTHUP-HAGE LUMBER COMPANY
Pacific Coast
Timbers, Lumber, Lath and Shingles
525-526 Henry Building
Seattle, Wash., Oct. 24, 1919
Order No. 316-327

Eureka Cedar Lbr. & Shgle Company,
Hoquiam, Washington.
Gentlemen: Please enter our order for the following:
Ship to Northup-Hage Lumber Company at Cincinnati, Ohio.
Route Any Route
Price F. O. B. Cincinnati, Ohio—70½c rate. Underweights to Mill.
Terms 100% less 2% Advance. Time of shipment as soon as possible.

Quantity	Description	Price
	Your entire output No. 1 Fir or Hemlock Lath 4' up to and including January 31, 1920	
	Air or Kiln Dried	10.00
	West Coast Association Standard Sizes	
	It is our understanding that we can depend on receiving a minimum of twelve cars during the above specified time, but you do not guarantee any fixed amount.	
	All quotations are made on the basis of present freight rates. Any increase in freight rates or taxes assessed by the U. S. Government on freight bills must be absorbed by purchaser.	

We accept above order subject to conditions noted, and will ship about.....
Date..... Signed Eureka Cedar Lumber & Shingle Co.
By Gregg

The trial court found:

"I. That the defendant fully performed the contract in suit and delivered to the plaintiff all number 1 lath manufactured by it during the contract period.

"II. That the manufacture of lath was not complete until the same was dried and in deliverable condition, and all such manufactured during said period was delivered pursuant to the contract.

"III. That the defendant did not sell third parties any part of its output during said contract period, except that it did sell locally 48,000 lath, but it substituted and delivered to the plaintiff 140,000 spruce lath which were accepted by the plaintiff in lieu thereof; that the plaintiff has suffered no damage."

Disregarding the evidence leading up to the making of the contract, which appellant urges was inadmissible, except only such as tends to show what was within the contemplation of the parties, it appears that respondent operates a saw mill in which it cuts lath as a by-product; that its dry kiln capacity is limited, and it can produce air and kiln dried lath only as the weather and its dry kiln capacity will permit, all of which was well known to appellant at the time the contract was entered into. It appears that respondent, during the time fixed in the contract, cut many more lath than it could dry within that period, because of its limited drying capacity, and that the excess green lath was sold to others.

Appellant contends that the words "your entire output" used in the contract mean respondent's entire cut, while respondent contends that, as the contract provides that the lath shall be air or kiln dried, there was no output within the meaning of the contract except as the dry product was produced. We think the contract, the original of which is before us, must be so read. Taking the contract as a whole, it clearly appears that the buyer might have refused to accept, under its terms, lath not air or kiln dried, and that, since delivery was to be f. o. b. Cincinnati, with underweights to the mill, respondent might have suffered

financially by shipping green lath, even though the price of dry and green lath be the same.

"Output," must necessarily mean the finished production of the thing sold, and since, within the terms of the contract, it could be finished and ready for shipment by rail only by being air or kiln dried, the lath cut by respondent did not become its output, as the term is here used, until air or kiln dried, as provided in the contract.

The evidence amply sustains the findings of the trial court that the respondent complied with the contract so construed; and finding no reversible error, the judgment appealed from is affirmed.

PARKER, C. J., MOUNT, MITCHELL, and MAIN, JJ., concur.

[No. 15979. Department Two. March 3, 1921.]

E. G. ADAMS, *Respondent*, v. WALKER D. HINES, *Appellant*.[1]

MASTER AND SERVANT (20-2)—INJURIES TO SERVANT—FEDERAL LIABILITY ACT—INTERSTATE COMMERCE. A section hand, injured on the derailment of a hand car, was not engaged at the time in interstate commerce or the business of the company, where he and others had quit work for the afternoon and, contrary to the rules of the company, had left their section to obtain supplies for their boarding club, without the knowledge of the company, which furnished free transportation for all supplies needed by the men.

SAME (77)—INJURIES TO SERVANTS—VICE PRINCIPALS—FOREMEN—AUTHORITY. A section foreman's order to his men to leave their section, contrary to the rules of the company, and obtain supplies for their boarding club, was not an order concerning the company's business and created no liability on the part of the company.

Appeal from a judgment of the superior court for Spokane county, Alex M. Winston, Esq., judge *pro tempore*, entered January 29, 1920, upon findings in

[1]Reported in 196 Pac. 19.

favor of the plaintiff, in an action for personal injuries sustained by a section hand in the derailment of a hand car. Reversed.

A. C. Spencer and *Hamblen & Gilbert,* for appellant.

Richard B. Harris and *Turner, Nuzum & Nuzum,* for respondent.

MITCHELL, J.—Action under the Federal Employers' Liability Act to recover damages for personal injuries. The case was tried by the court without a jury and resulted in findings and conclusions of liability on the part of the defendant, that the plaintiff had been injured by the negligence of the defendant, that the total damages amounted to four thousand dollars, from which amount the sum of fifteen hundred dollars should be deducted because of the contributory negligence of the plaintiff. Judgment for plaintiff was entered in the sum of twenty-five hundred dollars. No exceptions were taken by the plaintiff to the findings and conclusions, nor has he taken any appeal. Exceptions were taken by the defendant, who has appealed from the judgment.

The respondent had been employed for some days by the appellant as a member of a section gang engaged in surfacing, repairing and maintaining the upkeep of the main line of the defendant railroad, which was engaged in interstate commerce. The crew consisted of nine to twelve men, including a foreman, all of whom lived in a section house at a station or place called "Mack," on their section, which was a part of the main line of the railroad running through Adams county. At the section house, for the accommodation of themselves and one other not belonging to the crew, they conducted what they termed "a kind of club," bought their own supplies, did their own cooking, and each paid his part

of the cost and expense so incurred. On Saturday, April 27, in the forenoon while the gang was at work on the section, it appears there was talk among the men to the effect they would get through early and go to Washtucna for meat and groceries. The foreman testified he did not remember which ones of the crew spoke to him about it, but that:

"They asked me if I would take them to get food, to go for supplies, and I told them if we finished the work here we will have time to go down."

The foreman and his crew used a motor car for their transportation on the section. About the middle of that afternoon, they quit work and went to the section house. The water keg and about all the work tools were taken off the motor car. The foreman put some of his crew at work cleaning up around the section house. He took the remaining four or five of them, including the respondent, and two other persons not belonging to the crew (one of whom wished to go for supplies) on the motor car and proceeded to Washtucna, situated some twenty-five miles from the section in charge of this foreman. Washtucna is situated on a branch line of the railroad and is in the second section west of Mack.

Upon reaching Washtucna, meat and other supplies for the club were purchased by some of the party other than the foreman or the respondent. Within a few hundred yards after starting back, about or a few minutes before six o'clock, the motor car ran into an open switch, clear off the track, and caused the respondent's injuries complained of. Several times the foreman had taken a part of his crew to the same place for the same purpose, more than one of which trips it appears was not on the company's time. The crew worked ten hours per day—seven a. m. to six p. m. As to the rule of going off the section, the foreman testified as follows:

"Q. But you can't go off your section unless you are called for in case of emergency by some section foreman, isn't that correct? Ans. What? Q. That is the rule? Ans. When another section foreman wants to get help I go to him. Q. Unless that happens you can't go? Ans. No, sir. Q. Or the road master orders you? Ans. No. Q. Your work is within your own section, isn't it? Ans. Sure."

The evidence shows also that a foreman has the right to hire members of his gang. It also shows:

"The section foreman is assigned out to a certain piece of road called a section, and he sees that the upkeep and maintenance are done in a proper manner, and to watch the condition of the road, road bed and track and see that the men perform their duty, fulfill the working hours of the company and obey the road master's instructions."

The section men or foremen are not permitted to leave their jurisdiction without the permission of the road master, who can order them to assist in another section when needed for extra work therein. The road master testified that he never gave this foreman permission to go to Washtucna or to leave his section other than to help to work in another section. On cross-examination, the foreman was asked: "Now they never gave you permission to go off your division and get groceries did they?" He answered, "No, I never had any such permission." Upon the subject of the knowledge of his superiors of his going off his section for supplies, while his testimony in chief indicated such knowledge, on cross-examination he clearly testified: "Q. So far as you know they never knew you went off your division before this, did they? Ans. No."

There being no place on this section where all the supplies needed for the club house could be procured, the road master had informed the foreman of his right

to have free transportation for supplies from Spokane; and that there was no right in the foreman to use the company's time in getting groceries, etc., and that he had never known of its being done here or that such trips were made at all, until after this accident. The foreman testified, he had at times gotten supplies from Spokane but that he had paid the freight or express charges. The record is silent as to whether he stated those charges in his accounts against the company. It should be mentioned that the respondent, a Greek without understanding of the English language, didn't know where they were going when they left the section house on the afternoon he was hurt, and that on the trip after passing beyond the section he belonged to, he asked what they were going for and a member of the crew said they were going to buy some meat and supplies "but that isn't any of your business."

The main contention in the case is whether or not the respondent was "employed in interstate commerce" at the time he was injured, as that term is used in the act of Congress (Act April 22, 1908, 35 Stat. p. 65, ch. 149; U. S. Comp. St. 1916, § 8657-8665).

The language of the act of Congress is general rather than concrete. For the purposes of this case, it provides that every common carrier by railroad while engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, etc." As supporting the judgment, attention is called to the recent case of *Philadelphia, B. & W. R. Co. v. Smith,* 250 U. S. 101, 63 Law Ed. 869. That case, however, is not helpful authority here. It was a case in which a cook employed by the company was injured in a collision between an engine and a camp car, on a side track, while he was at work in the camp car provided by the rail-

road company. He was at work with a gang of bridge carpenters engaged in the repair of bridges along the entire line of the railroad, and were moved from point to point as the repair work required. His duties were to take care of the camp car, keep it clean, attend to the beds, and prepare and cook the meals for himself and other members of the gang.

"He was employed by the defendant to assist, and actually was assisting the work of the bridge carpenters by keeping their beds and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place."

The camp car was "furnished and moved by the defendant." That is to say, he was injured at his post of duty according to a plan and design allowed, ordered and approved by the railroad company. Not so in the case at bar, where the respondent was injured away from the section to which he belonged. He was away not only without permission, but in the face of the rules of the railway company. His place of duty was fixed, and on the occasion in question, the crew was in no sense forwarding the work of the employer by reducing the time to procure supplies. The supplies could have been had at any time by delivery by the railway company at their club house door rather than use the employer's time to carry out the unnecessary plan of their foreman.

The respondent also relies on the case of *Baltimore & O. R. Co. v. Whitacre,* 124 Md. 411, 92 Atl. 1060, affirmed by the supreme court of the United States (242 U. S. 169, 61 Law Ed. 228). The decision of the supreme court of the United States does not go into particulars. As reported in the Maryland decision, it appears that

Whitacre was a front brakeman and was called about one o'clock in the morning to attend a train about to be moved in interstate commerce. He reported and proceeded through the yard of the railroad company to the engine which was to be coupled to his train. It was standing on a "ready track," and upon his inquiring of the fireman (the engineer not being present) whether he was ready to start, he received the answer:

"No, not quite. The tool boy had not been there and left him no tin cup, and he asked me to go and hunt the tool boy and get a tin cup."

That was the testimony of the plaintiff. Acting on what he understood to be the order of the fireman, he started to look for the tool boy and tin cup. He mistook a moving light for a lantern in the tool boy's hand. Suddenly the light disappeared behind an object subsequently ascertained to be an engine. Plaintiff took a few steps backward and fell into a cinder pit and was injured. The court concluded there was liability under the Federal act, resting its decision upon the case of *Philadelphia, B. & W. Co. v. Tucker*, 35 App. D. C. 123, and *North Carolina R. Co. v. Zachary*, 232 U. S. 248.

In the *Tucker* case, a locomotive fireman was properly called at an unusual time of the night from his lodging place for train service. In going to his engine and while he was upon the company's tracks, he became confused, it seems, by the passing of two trains running in opposite directions, and was killed. It was contended by the company that there could be no liability until he reached the engine or conveyance of the company, that until then he was not under the master's control. But the court held otherwise, saying when Tucker was killed, he was upon the premises of the defendant, in response to its call, to assume the duties

he had been engaged by the defendant to assume, and for their mutual interest and advantage; and further said:

"We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master."

The *Zachary* case was similar. A locomotive fireman after inspecting, oiling, firing and preparing his engine for starting on a trip, attempted to cross certain tracks that intervened between the engine and his boarding house, and was struck and killed by another engine. The state court held that the Federal act did not apply, but the United States supreme court held that it did. Neither of the three cases is applicable here, where the employee's situation was lacking in the essential spoken of in the *Tucker* case, that of being "rightfully and necessarily" at the place of business at the time of the injury.

In the case of *Morrison v. Chicago, M. & St. P. R. Co.*, 103 Wash. 650, 175 Pac. 325, speaking of determining if one is or is not engaged in interstate commerce, in a given case, we said that test is:

"Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test the three essential factors to be considered are time, place and intent."

By that test, the law though "intended to be applied in spirit rather than by letter," cannot be made to

cover this case. Without any authority, the foreman and part of his crew, including the respondent, were away on the company's time, as they (other than the respondent) had been before, to purchase supplies to last for two or three weeks, pursuant to their club house plan, when there was no necessity whatever to conduct their club house so as to either take them off their section or to lose any time from their service to the railroad company. That there was no necessity, is shown by the evidence to the effect that, after the accident and up to the date of the trial, the same foreman and his crew, at the same section club house, had provided well for their meals by railroad transportation of needed supplies—a plan at all times theretofore available and sufficient when employed. While the accident occurred on the appellant's property, respondent's engagement at the time was not so directly connected with interstate commerce as to constitute an integral part of it.

"To render the carrier liable, the negligent act must occur while the employees are doing some act *required* in the prosecution of the carrier's business." *Reeve v. Northern Pac. R. Co.*, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C 37.

The authority of the section foreman to hire and discharge members of the crew is not controlling in this case to fix any liability upon the appellant. If respondent, at the time he was injured, was under an order of the foreman, he was yielding to an order beyond the scope of the foreman's authority. It was an order that had no reference to the master's concerns, and there was, of course, no liability on the master's part. This is the general rule and has been uniformly followed in this state. *Reeve v. Northern Pac. R. Co.*, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C 37; *Hobbs v. Great*

Northern R. Co., 80 Wash. 678, 142 Pac. 20, L. R. A. 1915D 503; and *Vanordstrand v. Northern Pac. R. Co.*, 86 Wash. 665, 151 Pac. 89.

Reversed, with directions to the trial court to enter a judgment dismissing the action.

HOLCOMB, MOUNT, MAIN, and TOLMAN, JJ., concur.

[No. 15953. Department One. March 7, 1921.]

In the Matter of the Estate of ELIZABETH FOSS. MICHAEL W. PADDEN *et al., Respondents*, v. J. M. THATCHER, *as State Tax Commissioner, Appellant.*[1]

TAXATION (229)—INHERITANCE TAX—EXEMPTIONS. The rule that exemptions from the inheritance tax are to be strictly construed and the beneficiary clearly within the statutory provisions, is qualified as to charitable bequests, which should be upheld and given effect whenever possible.

EVIDENCE (2)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE. The courts will take judicial notice that most religious corporations are charitable.

TAXATION (229)—INHERITANCE TAX—EXEMPTIONS. Extrinsic evidence is admissible to show the charitable purpose of a certain "Home for Boys", and that a bequest for its use was, therefore, not subject to the inheritance tax, under Laws of 1917, p. 597, § 7, exempting certain charitable bequests.

SAME. Where at the time of a bequest to a home for boys, it was exclusively maintained for the support and education of orphaned or indigent children, it is expressly exempted from the inheritance tax by Laws of 1917, p. 597, § 6.

Appeal from the judgment of the superior court for King county, Frater, J., entered January 5, 1920, upon findings in favor of the estate, exempting a charitable bequest from the inheritance tax, after a trial on the merits to the court. Affirmed.

[1]Reported in 196 Pac. 10.

J. M. Thatcher and *Geo. G. Hannan,* for appellant.

Stanley J. Padden and *Donworth, Todd & Higgins,* for respondents.

HOLCOMB, J.—The probated will of the decedent contained a residuary clause as follows:

"Eleventh: All the rest, residue and remainder of my property, real, personal or mixed, wheresoever situated or located, I give, devise and bequeath unto 'The Corporation of the Catholic Bishop of Nesqually, in the Territory of Washington,' in trust nevertheless and for the use and benefit of the Edwin Briscoe Home for Boys located near Orillia, Washington."

Upon the final settlement of the accounts of the executors, the residuary balance in the hands of the executors which was to go to this trust was found to be $6,066.78.

The trial court found and decreed that the residuary legacy for the use and benefit of the Edwin Briscoe Home for Boys was for a charitable purpose, and exempt from inheritance taxation. Appellant, the state tax commissioner, excepted to the finding and decree that the bequest was exempt from inheritance tax, and appealed therefrom.

The statute applying is Laws of 1917, p. 597, § 6, which reads as follows:

"All bequests and devises of property within this state when the same is for one of the following charitable purposes, namely, the relief of the aged, indigent and poor people, maintenance of sick or maimed, the support or education of orphans or indigent children, . . . shall be exempt from the payment of any inheritance tax, and any property in this state which has been devised or bequeathed for such purposes and upon which a state inheritance tax is claimed or is owing is hereby declared to be exempt from the payment of such tax, and the same is hereby remitted."

This same exemption statute was before us in *In re Duncan's Estate,* 113 Wash. 165, 193 Pac. 694, and there we observed:

"It will be observed that this act is somewhat narrow in its terms. It does not purport to exempt bequests for any or all charitable purposes, but confines the exemption to those specifically named, which are: (1) relief of aged, indigent and poor people (and we will assume that, if the objects of charity be poor, they need not necessarily be aged); (2) the maintenance of the sick and maimed, and (3) the support and education of orphans or indigent children."

In that case, we held that the bequest by the will of Duncan was not exempt for the reason that, as stated in the opinion, the income from the benevolent fund was to be used by the trustees in their discretion for the relief of the distressed and unfortunate and helpless, with the provision that the trustees in their discretion might at any time determine that the need or desirability for such a fund had ceased, in which event the principal sum and the income therefrom should be merged with the remainder of the estate. We there concluded that, since it was wholly within the discretion of the trustees to divert the fund as and when they should see fit, and when so diverted it must be treated as the remainder of the estate, we felt unable to lay down the rule that the fund was not taxable, and thereby open the way by which the unprincipled might in all cases avoid the tax entirely.

We adhere to the rule insisted upon by appellant that the provisions of the law granting exemptions are to be strictly construed against the claimant. The beneficiary must be clearly within the statutory language. *In re Ferrel's Estate,* 112 Wash. 231, 192 Pac. 10. This is a salutary rule to the end that the legislative intent as to sources of revenue for the support of the government

and its existing institutions should not be defeated, either in whole or in part. But the rule is qualified as to charitable beneficiaries, for the reason that charitable trusts tend to lessen the burden of government, as those objects are necessarily a burden either upon the whole or a part of the public; hence, when a part of the public is engaged in supporting and educating orphans and indigent children, as named in the statute, the remainder of the public are to that extent relieved therefrom. The rule has therefore come to be stated, of recent years, at least, that charitable bequests should be upheld and given effect whenever possible. Blakemore & Bancroft, Inheritance Taxes, § 241, p. 196.

It is true, of course, that exemption is a matter of grace on the part of the legislature and cannot be claimed beyond the extent to which the lawmaking body has seen fit to allow it (*In re Timkin's Estate,* 158 Cal. 51, 109 Pac. 608); and it is true also that, where the law imposes the tax in general terms, only those plainly exempt from it are excluded from its provisions. Blakemore & Bancroft, Inheritance Taxes, § 242.

Appellant claims, however, that the bequest should specify its purpose so that it manifestly comes within the language of the statute, or that the object of the bequest is so proven to be within the provisions of the statute that there can be no question. In other words, that the beneficiary must be such an institution as by its very objects and purposes exclusively comes within the exemption of the statute. True, the exception in our statute specifies the precise objects of charity which are exempt, and does not use general terms such as are used in many of the states; as for instance, Iowa, where the inheritance tax law extends exemptions from inheritance tax to "charitable institutions", without restriction or qualification, except as the term imports. *Mor-*

row v. Smith, 145 Iowa 514, 124 N. W. 316, Ann. Cas. 1912 A 1183, 26 L. R. A. (N. S.) 696.

In that case the bequest was to a Masonic Lodge, the exclusive object and purpose of which was not general charity, but the bequest was made to the lodge for charitable purposes, and among the principal objects of the order or lodge were benevolences towards its sick and maimed or indigent members, and their widows and orphans. These purposes were shown by extrinsic evidence, and the supreme court of Iowa held that it was a proper object of such charitable bequests or donations and that the exemption from collateral inheritance tax applied.

The court in that case observed:

"Gifts and bequests by individuals to such institutions are properly regarded as benevolent and charitable, and the donor of such gifts is deemed to be public spirited. It is not at all unreasonable that the legislature should deem it proper to impose no succession tax upon a gift to such an institution. On the contrary, the public good may be quite as well served by offering an exemption from such a tax. Such exemption carries with it some measure of inducement to testators to confer their bounty through those instrumentalities upon a large, and always varied, part of the public, . . . If such was the purpose of the legislature it was commendable."

Again, in *In re Spangler's Estate,* 148 Iowa 333, 127 N. W. 625, where the trust was "in perpetuity to the dependent poor persons of Delaware county, who are maintained solely or in part at the expense of the county." Although as stated above, the statute of Iowa provided for exemption from collateral inheritance tax on "charitable institutions" without restriction, or qualification, the court, in the last case cited, held that bequest exempt from collateral inheritance tax. The court again observed that:

"That the law in this respect is to be liberally construed to promote the benevolent purpose of the exemption has already been held by this court in *Morrow v. Smith,* 145 Iowa 514."

In New York the inheritance tax law provided:

"Any property devised or bequeathed to any person who is a bishop, or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, . . . shall be exempted from and not subject to the provisions of this article, etc." *In re Moore's Estate,* 66 Misc. 116, 122 N. Y. Supp. 828.

It was held that a colony for epileptics under the charge of the Women's Christian Temperance Union fell within the clause of benevolent, charitable corporations exempted from the payment of the transfer tax under that law, and evidence extrinsic was received to show the uses and purposes of the object of the bequest. See, also, *In re Moses' Estate,* 138 App. Div. 525, 123 N. Y. Supp. 443; *In re White's Estate,* 118 App. Div. 869, 103 N. Y. Supp. 688; *In re Albright's Estate,* 93 Misc. Rep. 388, 156 N. Y. Supp. 821; *In re Curtis' Estate,* 88 Vt. 445, 92 Atl. 965.

Appellant insists that, since the will making the bequest did not in specific words say that the bequest was for the "support and education of orphans and indigent children", proofs cannot be received as to the real purposes of the bequest. Appellant quotes the following language from *In re Duncan's Estate, supra,* to sustain his contention that extrinsic proof could not be received to sustain the exemption.

"It appears from the record that Mr. Duncan had permitted the industries and the schools to pass out of his control some years before his death and before the making of his will, and while perhaps incompetent as evidence, one of the trustees under the will testified that

the trustees had no intention or purpose to resume the school or industrial work."

Appellant contends that the above language clearly shows that the intentions of the parties in administering the trust fund under the will are not admissible in evidence. That language by no means controls the question involved in the instant case. If the bequest was for a specific purpose, the executor or trustee of that trust could neither effect nor defeat the trust by the testimony as to intention. The trust would exist nevertheless. Here the trustee is a religious corporation. We will take judicial notice of the fact that most such institutions are largely charitable. The beneficiary of the trust is a home for boys. The assessing officers or the court having jurisdiction of course could not determine from the name of that beneficiary that it was such an institution as comes within the purview of the statute of exemption, and it is from that fact that appellant urges that no extrinsic testimony should be received to define the object of the trust.

We are of the opinion that the decision in the *Duncan Estate* case is in no wise controlling upon this matter and that, even under our rule of strict construction, the beneficiary must clearly show himself to be entitled to the exemption, and that may be shown by competent extrinsic evidence. In some cases, as in the *Ferrel Estate* case, *supra,* where we announced the rule, the matter was determined as a matter of law upon the face of the record. In the *Duncan Estate* case, *supra,* it was determined as a matter of law under the provisions of the statute and construction of the will; the terms of the bequest there defeating the exemption.

Here, the evidence shows—summarizing it—that the testatrix had for some years maintained the institution known as the "Edwin Briscoe Home for Boys," in

memory of a son of hers by her first marriage, who, during his lifetime had been active in boy welfare work; that the testatrix had erected the buildings and had turned them over to the charge of men known as "The Christian Brothers of Ireland" who dedicated their lives to the cause of caring for and educating orphan boys regardless of sect or color, who were under a religious vow of poverty, and received no compensation for their services except their food and clothing; that the buildings were erected and maintained by the testatrix for no other purpose than that of an orphan asylum; that the institution has always been and is now exclusively engaged in the work of caring for orphans and indigent boys, and was supported during the lifetime of the testatrix by gifts from her and by the sale of charity tags upon the streets of the city of Seattle, and that all the boys supported and educated there are and have been orphans, and the institution is carried on exclusively for that purpose; that all funds that come from this estate will be used for the benefit of these indigent orphans.

Appellant argues, however, that those who are conducting the home may at some time in the future see fit to change its purpose and functions, and that therefore this gift is not, assuredly, for the exempted purpose.

We do not have to look to the future. We have only to look at the character of the institution and the nature of the bequest at the time of the death of the testatrix, and the time when the will took effect; and if, at the time of the passing of the bequest, it passed to an institution the objects of which bring it within the purview of the exemption statute, it is exempt, no matter what may happen to the institution in the future. *Parkhurst v. Burrill,* 228 Mass. 197, 117 N. E. 39; *In re Altman's Estate,* 87 Misc. Rep. 255, 149 N. Y. Supp. 601; *Pierce*

v. Stevens, 205 Mass. 219, 91 N. E. 319. That, we consider the situation in this case.

The uncontroverted evidence in the case showing that the Edwin Briscoe Home for Boys was an institution at the time of the death of the testatrix exclusively maintained for the support and education of orphans or indigent children, bequests and devises for benevolence to those classes being exempted by the statute under consideration, we conclude that the findings and judgment of the trial court were right in exempting the bequest from inheritance tax.

Decree affirmed.

PARKER, C. J., MACKINTOSH, BRIDGES, and FULLERTON, JJ., concur.

[No. 16160. Department One. March 7, 1921.]

JOHN T. GOULETTE *et al., Appellants,* v. FLORA GOULETTE, *Respondent.*[1]

FRAUDULENT CONVEYANCES (21)—INTENT TO DEFRAUD CREDITORS. A conveyance by a husband for the use of his children, pending an action for a divorce, is fraudulent as to the wife, where the purpose was to prevent her from receiving any share of the property.

DESCENT AND DISTRIBUTION (7)—VESTING OF TITLE. Upon the death of one spouse without leaving a will, one-half of the community property immediately vests in the children, who become tenants in common with the surviving parent.

TENANCY IN COMMON (2-1)—TITLE AND RIGHTS IN GENERAL. Where the surviving husband has become tenant in common with his children of community property, his conveyance can pass title only to his one-half interest.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 23, 1920, upon findings in favor of the defendant, awarding property in divorce proceedings, after a trial to the court on the merits. Reversed.

[1]Reported in 195 Pac. 1045.

George Olson and *Wm. R. Bell,* for appellants.
Elias A. Wright and *Sam A. Wright,* for respondent.

MACKINTOSH, J.—The appellant John T. Goulette, then a married man, arrived in Seattle in 1876, and soon thereafter acquired four lots in that city. Some time later Mrs. Goulette died, leaving surviving her the appellant and six children. She made no will and her estate was never probated. In 1905, the appellant, Goulette, married the respondent, who, in 1915, began an action of divorce against him, which action was dismissed, but since that time the parties have been living separate and apart.

Immediately after the failure of the divorce case, the appellant organized a corporation, the John T. Goulette Company, the other appellant in this action, to which he conveyed the four lots, taking in exchange therefor the entire capital stock, which he distributed among his children, giving a one-sixth portion to each. In July, 1919, the appellant instituted an action of divorce against his wife, to which she filed a cross-complaint. The court, after hearing the testimony, granted a divorce to each and awarded to the respondent one of the lots in question. Before the formal decree was signed, the respondent, learning that this lot had been conveyed to the appellant corporation, brought that corporation in as a party to the action, and the court, upon hearing the evidence, found that the conveyance in 1915 to the corporation was made for the purpose of defrauding respondent, and again awarded the lot to her, and directed the corporation to convey it. From this order, this appeal has been taken, on the ground that the appellant Goulette had no interest in the property at the time of the award.

We are in agreement with the trial court in finding that the conveyance by Goulette to the corporation had the effect of perpetrating a fraud upon the respondent and was made with the idea of preventing her receiving any share of his property in the event of a divorce, the probability of which was very great. The court, however, was in error in awarding the lot to the respondent, for the reason that it was not the property of either of the appellants. Upon the death of their mother, intestate, the Goulette children became immediately vested with the title to one-half of the property acquired by the appellant and his first wife, and no probate was necessary to pass the title. *Hill v. Young,* 7 Wash. 33, 34 Pac. 144; *Philbrick v. Andrews,* 8 Wash. 7, 35 Pac. 358; *Cox v. Tompkinson,* 39 Wash. 70, 80 Pac. 1005; *Eckert v. Schmitt,* 60 Wash. 23, 110 Pac. 635.

The appellant and his children became tenants in common, and the appellant had no right to transfer their interest. The fact that they may have allowed him to handle the property as though he were the sole owner would give him no greater right than that of a trustee acting in their behalf; and, therefore, when he attempted to organize the appellant corporation and transfer all this property to it, that conveyance only operated to transfer his undivided one-half interest and the corporation took title to only so much of the property. The trial court was not empowered to compel the corporation to transfer to the respondent more than that to which it had title.

The action of the trial court is therefore reversed in this regard, and the cause remanded for such further proceedings as may be meet and proper.

PARKER, C. J., HOLCOMB, BRIDGES, and FULLERTON, JJ., concur.

[No. 16295. Department One. March 7, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Jos. B. Lindsley, Respondent,* v. JOHN GRADY *et al., Appellants.*[1]

CONTEMPT (8)—INJUNCTION (73)—VIOLATION OF ORDER—NOTICE TO PARTY OR OTHER PERSON. A person not a party cannot be punished for contempt in violating an injunction unless he had notice thereof; and a finding that a member of the I. W. W. had notice of an injunction directed against members of the order is not sustained where it merely appears that copies had been posted in numerous places in the county, and the decree given newspaper publicity, there being nothing to show that the member had been in the county for more than two days.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 12, 1920, upon finding defendant guilty of contempt of court. Reversed.

W. C. Donovan, George F. Vanderveer, and *Ralph S. Pierce,* for appellant.

William C. Meyer, for respondent.

MACKINTOSH, J.—On January 5, 1920, the superior court of Spokane county, in an action against several defendants, the appellant here not being one of them, made a decree enjoining the defendants "and all others not now known whose names and identity may hereafter be disclosed from associating, confederating, affiliating and acting in concert with said named defendants", from continuing as members of the I. W. W., and from "advocating, advising, teaching or promulgating the said theories, doctrines, practices and alleged principles of the said" organization and from "circulating or distributing any of the written or printed pamphlets,

[1]Reported in 195 Pac. 1049.

papers, handbills, documents or other propaganda or literature of" the I. W. W.

Thereafter, on June 30, 1920, the appellant was arrested and tried for contempt, in having violated this decree, and on trial was found guilty and sentenced. From that judgment, he has appealed.

Extended argument has been made attacking the validity of the decree, but we find it unnecessary to discuss that phase of the case, and will assume, without deciding, that the court had jurisdiction to enter such a decree and that the decree was in all respects valid and binding. The rule is in cases of injunction that the injunction binds the parties defendant, who are named and upon whom service has been secured, and all other persons who have knowledge of its provisions. In other words, that persons not parties to the injunction proceeding and against whom the decree is not directed by name may be punished for contempt if they violate the terms of the decree, provided that, subsequent to the making of the decree, they have been served with a copy of it or have had notice of it. In *O'Brien v. People,* 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219, the court said:

"Immediately after the writ of injunction was issued the Kellogg company had five hundred copies of it posted in the immediate vicinity of its works. It also had copies served upon some of the defendants personally, by the sheriff, and sent copies to others through the mail. The fact that some of the plaintiffs in error were not parties to the injunction suit and were not served with process, and had no notice of the application for the injunction, or were not served by the officer of the court with such injunction, is immaterial, so long as it is made to appear that they had actual notice of the contents of the injunction ordered and issued by the court. 'To render a person amenable to an injunction it is not neces-

sary that they should have been a party to the suit, so long as they had actual notice of the contents of such injunction' (High on Injunctions, Sec. 1444). With the exception of Fisher and Brent, it is admitted that all of the other plaintiffs in error knew of the injunction, and in view of the prominent part which they both took in the matter, it is unreasonable to suppose that they (Fisher and Brent) did not have knowledge of its existence. If they did not it was their duty to properly present that fact to the trial court upon the hearing, which they failed to do."

But a person not named as a party cannot be punished for contempt for having violated the terms of a decree of which he had no knowledge.

The testimony in this case shows that the officers arresting the appellant on June 30 had no acquaintance with him, and there is no testimony that a copy of the decree had ever been served upon him, and the only testimony tending to show that the appellant had any knowledge of such a decree was that it was proved that copies thereof had been posted in numerous places in Spokane county, and that the issuance of the decree had been a matter of considerable newspaper publicity and comment.

There is no testimony in the case showing the length of time the appellant had been in Spokane county, the only reference to this being a statement of one of the witnesses that he thought he had seen the appellant around Spokane about twelve days before his arrest, which testimony was later modified on cross-examination that it might have been only about a couple of days. The evidence, as we view it, is entirely inadequate to prove that the appellant had notice of the injunctive order, and he not having been a party to the action, of course, could not be held in contempt in having disobeyed the decree of which he had no notice. This view is supported by the following authorities: *United*

States v. Elliott, 64 Fed. 27, and *Garrigan v. United States,* 163 Fed. 16, 23 L. R. A. (N. S.) 1295, wherein it is said:

"The finding that the plaintiff in error had 'full knowledge of the injunction'—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of 'the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf' . . . which arises alike in respect of notice and conduct, as 'an instrument of proof created in his favor', and the mere inference of 'full knowledge' derived solely from the above mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined."

In *State v. Lavery,* 31 Ore. 77, 49 Pac. 852, the following language occurs:

"It is true the decree restrains the 'defendant Daniel Lavery, his agents, attorneys and employes, and all persons acting under, by, or through him', etc. But without serving a copy thereof upon the defendant John Lavery, or alleging or proving that he had knowledge of its provisions, he cannot be in contempt for violating its terms. While there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction, who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt by violating its provisions."

In *Harris v. Hutchison,* 160 Iowa 149, 140 N. W. 830, 44 L. R. A. (N. S.) 1035, the court says:

"It is true that in this opinion the following words were used: 'The decree was sufficiently broad in its terms to enjoin all persons from maintaining a nuisance on the premises therein described, and it was sufficient, as a public record, to impart constructive notice to all persons'. It is evident that those words were used with reference to the facts in that particular case, and where it says, 'It was sufficient as a public record to impart constructive notice to all persons', it evidently meant, and should be understood as meaning, all persons dealing with the property as purchaser, or lessee, or dealing with the property itself."

For these reasons, the trial court was in error in finding the appellant guilty of contempt. The judgment will be reversed and the appellant discharged.

PARKER, C. J., BRIDGES, FULLERTON, and HOLCOMB, JJ., concur.

[No. 16289. Department One. March 7, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. MARIE McDONALD, *Appellant*.[1]

FORGERY (4) — INDICTMENT AND INFORMATION (73) — DUPLICITY—SERIES OF ACTS. An information for forgery is not duplicitous where the acts charged were of a series constituting one crime.

JURY (44)—COMPETENCY—PRIOR SERVICE—SAME OR SIMILAR CASE. Under Rem. Code, § 330, disqualifying one who had served as a juror in a criminal action by the state against either party upon substantially the same facts, a juror is not disqualified in a prosecution for forgery of an indorsement on an instrument by previously sitting at the trial of defendant's sister charged with forgery of another indorsement upon the same instrument, since defendant was not a party to the former action.

WITNESSES (114)—IMPEACHMENT—STATEMENTS CONTRADICTED. A witness testifying as to the ownership of an automobile may properly be impeached by the admission of a bill of sale of the car.

TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE. It is not error to reject cumulative evidence as to defendant's condition,

[1]Reported in 195 Pac. 1048.

especially where it referred to a time after the occurrence of the alleged offense.

Appeal from a judgment of the superior court for Spokane county, Frater, J., entered May 17, 1920, upon a trial and conviction of forgery. Affirmed.

C. T. McDonald, F. W. Girand, and *C. W. Greenough,* for appellant.

Joseph B. Lindsley and *Clarence A. Orndorff,* for respondent.

MACKINTOSH, J.—From a conviction for forgery, Marie McDonald appeals, claiming, first, that the information upon which she was tried charged more than one crime. This contention seems to be answered by the cases of *State v. Newton,* 29 Wash. 373, 70 Pac. 31; *State v. McBride,* 72 Wash. 390, 130 Pac. 486, where it was held that an information for forgery was not bad for duplicity, where the acts charged were of a series constituting but the one crime.

It is next claimed that the court should have sustained the defendant's challenge for cause to one of the jurors who had previously sat at the trial of defendant's sister, likewise charged with the crime of forgery of an endorsement upon the same instrument on which it was claimed the appellant here had forged a second endorsement. The answer to this assignment is that Rem. Code, § 330, disqualifies one: "having served as a juror in a criminal action by the state against either party upon substantially the same facts or transaction." The appellant in this action was not a party to the case against her sister, and although the testimony might be the same in both cases the *voir dire* examination of the talesman disclosed that he was fair and impartial, and had no opinion of the guilt or innocence of

this appellant. This assignment falls within the principle announced in *State v. Van Waters,* 36 Wash. 358, 78 Pac. 897.

It is next urged that the court commented upon the evidence in passing upon the admissibility of the testimony of one of the witnesses. The remark complained of was made by the court in explanation to appellant's counsel of the reason for his ruling and, as we read the record, by no possible construction of the remark could it be held to have been a comment on the testimony. *State v. Surry,* 23 Wash. 655, 63 Pac. 557; *Dunkin v. Hoquiam,* 56 Wash. 47, 105 Pac. 149.

It is suggested that there is not sufficient evidence to support the verdict. This assignment may be disposed of by the statement that the record is very nearly conclusive of the appellant's guilt.

Error is assigned in the admission in evidence of a bill of sale of the automobile in which the appellant left the state immediately after the commission of the alleged offense. The testimony was properly admitted as being an impeachment of the witness, who had testified as to the ownership of the car.

The refusal of the court to allow the appellant to introduce testimony as to her physical condition on the day the crime is alleged to have been committed is also complained of. Much testimony had already been introduced upon this question, and the testimony offered and refused was merely cumulative, and was further objectionable for the reason that it referred to appellant's condition a considerable time after the occurrence of the alleged offense.

Upon the whole record, the conviction was proper and the judgment thereon will be affirmed.

PARKER, C. J., BRIDGES, and HOLCOMB, JJ., concur.

[No. 16029. Department Two. January 10, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. MAX FAIRFIELD, *Appellant*.[1]

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 9, 1919, upon a trial and conviction of an attempt to rape. Affirmed.

E. C. Dailey and *A. E. Dailey*, for appellant.
Thos. A. Stiger and *Q. A. Kaune*, for respondent.

PER CURIAM.—The defendant in this case was, by verdict of the jury, found guilty of an attempt to commit forcible rape upon the person of Lydia Bush. The defendant has appealed from the judgment upon the verdict.

The only question for our consideration is the sufficiency of the evidence to justify the verdict. After reading the statement of facts we are satisfied that, if the testimony of the prosecuting witness is to be believed, there was abundant evidence to go to the jury. The credibility of the witness was solely for the jury.

There is no error in the record. The judgment must therefore be affirmed.

[No. 15945. *En Banc*. January 25, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. F. A. BROWN *et al.*, *Appellants*.[2]

Appeal from a judgment of the superior court for Benton county, Truax, J., entered January 7, 1920, upon a trial and conviction of criminal syndicalism. Affirmed.

George F. Vanderveer, *Ralph S. Pierce* and *Alexander Mackel*, for appellants.

G. W. Hamilton, *The Attorney General*, and *John A. Dunbar*, *Assistant*, for respondent.

MAIN, J.—The defendant, by information, was charged with criminal syndicalism, tried and convicted, and prosecutes an appeal to this court.

All the questions presented upon this appeal we think have been sufficiently covered in the recent case of *State v. Hennessy*, *ante* p. 351, 195 Pac. 211.

ALL CONCUR.

[1]Reported in 194 Pac. 556.

[2]Reported in 195 Pac. 218.

[No. 15793. *En Banc.* January 25, 1921.]

THE CITY OF SPOKANE, *Appellant*, v. JOHN GRADY, *Respondent*.[1]

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 12, 1919, dismissing a prosecution for criminal syndicalism upon sustaining a demurrer to the complaint. Reversed.

J. M. Geraghty and *Arthur L. Hooper*, for appellant.
George F. Vanderveer and *Ralph S. Pierce*, for respondent.

MAIN, J.—The defendant in this case was charged under an ordinance of the city of Spokane with criminal syndicalism. The superior court sustained a demurrer to the complaint upon the ground that it charged more than one crime, and the city has appealed.

The question of duplicity which is presented upon this appeal is substantially the same as that which was discussed in the recent case of *State v. Hennessy*, *ante* p. 351, 195 Pac. 211, and upon the authority of what was there said we think the complaint was not duplicitous and that the ruling of the trial court thereon was error.

The judgment will be reversed and the cause remanded with directions to the superior court to overrule the demurrer.

ALL CONCUR.

[No. 16198. Department Two. February 3, 1921.]

THE STATE OF WASHINGTON, *on the Relation of John Annette, Plaintiff*, v. J. V. MORRIS, *as Registration Officer, etc., Appellant*.[2]

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered July 19, 1920, directing the issuance of a writ of mandamus to compel defendant to register relator as a voter, after a hearing to the court. Reversed.

The Attorney General, T. L. O'Leary, and *H. Harmeling*, for appellant.

Troy & Sturdevant, for relator.

PER CURIAM.—The question presented in this case is identical with that decided by our recent decision in *State ex rel. Carroll v. Superior Court*, 113 Wash. 54, 193 Pac. 226; and, upon the authority of that decision, the judgment of the trial court, rendered in this case, is reversed.

[1]Reported in 195 Pac. 1043.

[2]Reported in 194 Pac. 898.

[No. 16202. Department One. March 2, 1921.]

MARGERY E. GANNON, *Respondent*, v. CHRIST M. JENSEN, *Appellant*.[1]

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 20, 1920, upon a verdict rendered in favor of plaintiff, in an action for breach of promise, after a trial on the merits. Affirmed.

Richards & Fontaine, for appellant.
Snively & Bounds, for respondent.

PER CURIAM.—The respondent's action is one for the breach of the appellant's promise to marry. The only question raised on the appeal from the judgment based on the verdict of the jury in favor of the respondent is that the evidence was insufficient to justify such verdict. Upon this pure question of fact, a reading of the entire testimony in the case does not permit us to say there was not evidence from which the jury might arrive at the conclusion which has resulted. A statement of the facts, or what might have been the conclusion arrived at by this court upon them, were it empowered to weigh the testimony, is therefore unnecessary. The judgment will be affirmed.

[1]Reported in 195 Pac. 1043.

INDEX

Abandonment:

Of ship and right to claim salvage, see SEAMEN, 2, 3.

Abatement and Revival:

Judgment as bar in another action, see JUDGMENT, 5-7.

Abstracts of Title:

Mitigation of damages sustained by untrue statement in abstract, see DAMAGES, 2, 3.

Attorney's fees as element of damages in action against abstracter, see DAMAGES, 4.

1. ABSTRACTS OF TITLE (2)—REQUISITES—PRIVITY. There is sufficient privity of contract to render an abstract company liable to plaintiff for an untrue statement in an abstract furnished at the request of plaintiff's attorneys, although the agency was not disclosed, or the purpose of the abstract stated. *Murphy v. Fidelity Abstract and Title Co.* 77

2. SAME (2) — RIGHTS, DUTIES AND LIABILITIES OF EXAMINERS OF TITLES. An abstracter is not warranted in reporting that an assessment lien was paid in full, where the county treasurer did not receive the amount of the assessment in payment of the tax, but only as the purchase price of the county's lien upon transfer of a certificate of delinquency. *Murphy v. Fidelity Abstract and Title Co.* 77

3. SAME. The fact that a certificate of delinquency was not filed in the auditor's office does not warrant an abstracter in stating in the abstract that the assessment was paid in full. *Murphy v. Fidelity Abstract and Title Co.* 77

Abutting Owners:

Assessments for expenses of public improvements, see MUNICIPAL CORPORATIONS, 5-8.

Preference right to purchase shore lands, see PUBLIC LANDS.

Acceptance:

Part payments, see ACCORD AND SATISFACTION.

Of benefits as ground of estoppel, see ESTOPPEL.

Of goods sold within statute of frauds, see FRAUDS, STATUTE OF, 1, 2.

Of rent as waiver of forfeiture, see LANDLORD AND TENANT, 9.

By buyer on sale of logs, see LOGS AND LOGGING, 2.

Accident:

To person on highway, see HIGHWAYS.
Liability or indemnity insurance, see INSURANCE.
Injury to servant or third person, see MASTER AND SERVANT.
Award for further injuries to workman, under compensation act, see MASTER AND SERVANT, 3.
Automobile collision in city street, see MUNICIPAL CORPORATIONS, 12.
Personal injuries in general, see NEGLIGENCE.
At railroad crossing, see RAILROADS, 2, 3.
Collision with auto truck at street crossing, see STREET RAILROADS.

Accord and Satisfaction:

1. ACCORD AND SATISFACTION (2)—FORM OF AGREEMENT—RECEIPT IN FULL. Where there was an agreement to pay a certain sum on account, an accord and satisfaction is not shown by the sending and acceptance of a check for a less sum reciting that it was in full settlement. *LeDoux v. Seattle North Pacific Shipbuilding Co*.... 632

Account:

Accrual of limitation on accounts, see LIMITATION OF ACTIONS, 1.

Accrual:

Of right of action, see LIMITATION OF ACTIONS, 1.

Acknowledgment:

Of indebtedness barred by limitation, see LIMITATION OF ACTIONS, 1.

Action:

See BILLS AND NOTES; CONTRACTS; FORCIBLE ENTRY AND DETAINER.
Stay of proceedings, see APPEAL AND ERROR, 6.
Recovery of deposits in general, see BANKS AND BANKING.
Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.
By stockholders on behalf of corporation, see CORPORATIONS, 2-5.
Against county for flooding lands, see COUNTIES, 2.
For divorce, see DIVORCE.
For fraud, see FRAUD.
Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.
Injuries on highway, see HIGHWAYS.
By or against husband or wife, see HUSBAND AND WIFE.
By or against infants, see INFANTS.
Bar by former adjudication, see JUDGMENT, 5-7.
To recover ground rent, see LANDLORD AND TENANT, 7, 8.
Recovery of possession by landlord, see LANDLORD AND TENANT, 9.
Unlawful detainer of leased premises, see LANDLORD AND TENANT, 10-18.
Limitation by statute, see LIMITATION OF ACTIONS.
To forfeit mining lease, see MINES AND MINERALS.

Action—Continued.

On bonds of municipal contractors, see MUNICIPAL CORPORATIONS, 3, 4.
For injuries from automobiles in streets, see MUNICIPAL CORPORATIONS, 12.
For injuries to person or property in general, see NEGLIGENCE.
Between cotenants, see PARTITION.
Injuries from accident at crossings, see RAILROADS, 2, 3.
Breach of contract in general, see SALES.
Against street railroads for personal injuries, see STREET RAILROADS.
Negligence of telephone company, see TELEGRAPHS AND TELEPHONES.
For exclusion of negro from seat in theater, see THEATERS AND SHOWS; TORTS.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 5-8.
Recovery of price paid for land, see VENDOR AND PURCHASER, 8.
By purchaser for damages for breach of contract, see VENDOR AND PURCHASER, 9, 10.
By or against warehousemen, see WAREHOUSEMEN.
Injuries from flowage, see WATERS AND WATER COURSES.

1. ACTION (26) — CONSOLIDATION — GARNISHMENTS. Two garnishment proceedings are properly consolidated where they both had for their purpose the impounding of certain promissory notes and their proceeds, belonging to the judgment debtor or his alleged transferee, and the effect of the consolidation was to protect the maker of the notes against double liability thereon. *Guaranty Security Co. v. Coad* 156

Admissions:

As evidence in criminal prosecutions, see CRIMINAL LAW, 5.

Agreement:

See CONTRACTS.

Agriculture:

Injury from construction of irrigation ditch, see WATERS AND WATER COURSES, 3.

1. AGRICULTURE (5) — LIENS — RIGHT TO. A farm laborer cannot claim a lien for caring for a crop of alfalfa by the customary seasonable conveyance of water from irrigation flumes, under Rem. Code, § 1131, giving a lien to one who "clears, grades, fills or otherwise improves" property at the request of the owner. *Michaud v. Burbank Co.* 205

Adjoining Landowners:

Walls built partly on land of two adjoining owners for joint benefit, see PARTY WALLS.

Adjudication:

Operation and effect of former adjudication, see JUDGMENT, 5-7.

Administration:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS; PARTNERSHIP, 3.

Admiralty:

Right to claim salvage, see SEAMEN.

Alimony:

Commitment for failure to pay, see HABEAS CORPUS.

Allowance:

To surviving wife, see EXECUTORS AND ADMINISTRATORS, 2-5.

Alteration of Instruments:

Forgery, see FORGERY.

Ambiguity:

Parol evidence to explain, see EVIDENCE, 4.

Amendment:

Of pleading, see PLEADING, 2.

Animals:

Wild animals, see GAME.
Larceny of, see LARCENY, 2.

Appeal and Error:

Costs on reversal, see COSTS.
Criminal appeals, see CRIMINAL LAW, 21-25.
Effect of reversal of judgment, after execution sale, see EXECUTION.

IV. RIGHT TO APPEAL.

1. APPEAL AND ERROR (93) — RIGHT TO APPEAL — COMPLIANCE WITH JUDGMENT. Plaintiffs in an action of unlawful detainer are not entitled to dismiss defendants' appeal from the judgment on the ground that possession had been since surrendered and the controversy ended, where plaintiffs' right to possession and the amount of the damages are involved. *Lochridge v. Natsuhara*..... 326

2. SAME (106)—RIGHT TO ALLEGE ERROR—WAIVER BY STIPULATION. Error cannot be predicated upon not withdrawing from the jury matter which was by stipulation submitted to and decided by the court. *Worthy v. Arctic Co*..... 435

V. PRESERVATION OF GROUNDS.

Objections and exceptions to reception of evidence at trial, see TRIAL, 2.

Appeal and Error—Continued.

3. APPEAL (142)—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS. Error cannot be predicated upon instructions as to the measure of damages where no exceptions were taken. *Worthy v. Arctic Co.* 435

4. APPEAL (143)—EXCEPTIONS—TO INSTRUCTIONS. A general exception to an instruction is not sufficient to raise the point that it should have been given in writing. *State v. Jensen*..... 401

VII. REQUISITES FOR TRANSFER OF CAUSE.

5. APPEAL (222)—REQUISITES FOR TRANSFER—NOTICE—FILING—PROOF OF SERVICE. An appeal will not be dismissed because of failure to file proof of service of notice of appeal within five days, where the proof was filed later and brought up by supplemental record and no delay or injury resulted. *Gazzam v. Young*..... 66

IX. SUPERSEDEAS.

6. APPEAL (241)—SUPERSEDEAS OR STAY—APPOINTMENT OF RECEIVER—EFFECT. The effect of an appeal from an order appointing a receiver, with supersedeas bond, is to take the property out of the possession of the court, and it is therefore subject to execution and sale under a judgment that was not superseded on appeal. *Daniel v. Reid*..... 211

XVI. REVIEW.

Review of findings of public service commission in fixing gas rates, see GAS.

7. APPEAL (395) — REVIEW — PRESUMPTIONS — ADMISSIBILITY OF EVIDENCE. The rule that error cannot be predicated on sustaining an objection to evidence, in the absence of an offer of proof as to what the answer would be, has no application to objections to proper cross-examination. *LeDoux v. Seattle North Pacific Shipbuilding Co.*. 632

8. APPEAL (418)—REVIEW—FINDINGS—ACTIONS AT LAW TRIED WITHOUT JURY. Findings of the trial court, sitting without a jury, will not be disturbed on appeal where there is a sharp conflict in the evidence, the trial court having seen the witnesses and observed their appearance and manner of testifying. *Vachon v. Ditz*.... 11

9. SAME (437)—REVIEW—HARMLESS ERROR—OBJECTIONS TO ANSWERS. Error cannot be predicated upon not withdrawing affirmative defenses where the matter was provable upon a general denial. *Worthy v. Arctic Co*..... 435

10. SAME (449)—REVIEW—HARMLESS ERROR — EVIDENCE—PREJUDICIAL EFFECT. In an action to recover advances made for certain expenditures, including a lease of premises, it is not prejudicial error to admit in evidence a lease which defendants claimed was not what had been agreed upon. *Bayers v. Barry*..... 252

Appeal and Error—Continued.

11. APPEAL (456) — REVIEW — HARMLESS ERROR — ERROR CURED BY WITHDRAWAL. Error cannot be predicated in allowing certain testimony to go to the jury, where it was subsequently withdrawn and the jury admonished not to consider it, unless it is affirmatively shown that the admonitions failed of their purpose. *Bayers v. Barry* 252

Application:

For sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 7.

For change of venue in civil actions, see VENUE, 2.

Appointment:

Of receiver, see RECEIVERS.

Apportionment:

Benefits of public improvements, see MUNICIPAL CORPORATIONS, 7, 8.

Appurtenances:

Water rights, see WATERS AND WATER COURSES, 2.

Argument of Counsel:

In criminal prosecutions, see CRIMINAL LAW, 9.

Review as dependent on objection in lower court, see CRIMINAL LAW, 21.

Arson:

Evidence of other offense, see CRIMINAL LAW, 4.

Assessment:

Negligence of abstractor in reporting payment of lien, see ABSTRACTS OF TITLE.

Of damages, see DAMAGES, 9, 10.

For public improvements, see MUNICIPAL CORPORATIONS, 5-8.

Assignments:

Of lease, see LANDLORD AND TENANT, 1-3, 10, 11, 13, 14, 17, 18.

Assumption:

Of risk by employee, see MASTER AND SERVANT, 7.

Of facts not in evidence in examining witnesses, see WITNESSES, 3.

Attorney and Client:

Attorney's fees in action by stockholder on behalf of corporation, see CORPORATIONS, 5.

Argument and conduct of counsel at trial in criminal prosecution, see CRIMINAL LAW, 9, 21, 25.

Attorney's fees as element of damages, in general, see DAMAGES, 4.

Attorney and Client—Continued.

Determination of claim for legal services in action for partition, see PARTITION.

Cross-examination as to value of services of attorney, see WITNESSES, 2, 3.

1. ATTORNEY AND CLIENT (40) — CONTRACTS FOR COMPENSATION—CONSTRUCTION AND OPERATION. An attorney's contract for twenty per cent of the share of an estate that might be recovered through litigation or otherwise, covers both real and personal property. *Beck v. Boucher* 574

2. ATTORNEY AND CLIENT (41) — CONTRACTS FOR COMPENSATION—CONTINGENT FEES — VALIDITY. An agreement for contingent attorney's fees, which was solicited, contrary to our code of ethics, Rem. Code, § 2370, entered into without fraud or misrepresentations, is not therefore void as against public policy, in view of Id., § 474, leaving the measure or amount of attorney's fees to the agreement of the parties. *Beck v. Boucher*..... 574

3. SAME (43-44-1)—COMPENSATION—ACTIONS—JUDGMENT. When, in an action for partition, a client repudiated her contract with an attorney to pay him twenty per cent of the share of the estate recovered, the attorney is entitled to personal judgment for the contract amount, and to have the same impressed upon her interest in the real estate. *Beck v. Boucher*..... 574

Authority:

Of corporate officers or agents, see CORPORATIONS, 7.

Of guardian as to property of ward, see GUARDIAN AND WARD.

Of guardian *ad litem*, see INFANTS, 2.

Of court to correct judgment, see JUDGMENT, 3, 4.

Of public service commission as to highway crossings, see RAILROADS, 1.

Automobiles:

Collision on highway, see HIGHWAYS.

Injury to third person from collision, see MASTER AND SERVANT, 8.

Regulation of use of motor trucks, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Care required of driver, see MUNICIPAL CORPORATIONS, 12.

Collision with train at crossing, see RAILROADS, 2, 3.

Negligence of driver of automobile struck by car, see STREET RAILROADS.

Avoidance:

Of contract of infants, see INFANTS, 1.

Award:

To workman under compensation act for permanent partial disability, see MASTER AND SERVANT, 2, 3.

Bailment:

See WAREHOUSEMEN.

Bankruptcy:

Conclusiveness as against creditors of judgment against trustee, see JUDGMENT, 6.

1. BANKRUPTCY (17)—DEBTS DISCHARGED—PART PAYMENT—NEW PROMISE — SUFFICIENCY. A new promise made after the filing of a petition in bankruptcy will revive the debt discharged, where a clear unequivocal oral promise is made by the party to be charged. *Vachon v. Ditz*..... 11

Banks and Banking:

1. BANKS AND BANKING (26) — GENERAL OR SPECIAL DEPOSITS — EVIDENCE AS TO PURPOSE—SUFFICIENCY. There was a special and not a general deposit, rendering the bank liable as a trustee and preventing the bank from charging the account, where plaintiff, a fireworks company, had a lien on gate receipts received at evening performances given by an exposition company, between whom it was agreed and understood that the money was to be held in a separate fund to be applied on the contract of plaintiff, who was offered the money late at night, and who, owing to the lateness of the hour, accepted a check instead on the assurance that the check would be good, made by the treasurer of the exposition, who was also the cashier of the bank, and the money was placed by him, or others by his direction, on the floor of the vault, where it remained over the holidays. *Hitt Fireworks Co. v. Scandinavian American Bank*.. 167

Bar:

Of action by former adjudication, see JUDGMENT, 5-7.

Benefits:

Acceptance of as ground of estoppel, see ESTOPPEL.

To property from public improvement, see MUNICIPAL CORPORATIONS, 5-8.

Bequests:

In general, see WILLS.

Bias:

Of judge as ground for change of venue, see VENUE.

Bills and Notes:

1. BILLS AND NOTES (64, 69) — BONA FIDE PURCHASERS — ACTUAL NOTICE — PRE-EXISTING DEBT. A creditor, taking promissory notes in payment of the debt, without notice of an infirmity, is a *bona fide* holder for value, within Rem. Code, § 3447, defining notice of an infirmity, and Id., § 3416, providing that an antecedent or pre-existing debt constitutes value. *Guaranty Security Co. v. Coad*..... 156

2. SAME (64, 69). A creditor taking promissory notes in payment is not a *bona fide* holder where the notes were past due and subject to the lien of a garnishment. *Guaranty Security Co. v. Coad* 156

3. SAME (64, 122) — BONA FIDE PURCHASER — GOOD FAITH—NOTICE—PRESUMPTIONS. That a note had its inception in a stock transaction is not sufficient notice to put a purchaser on notice of any infirmity, and unless bad faith, as defined by Rem. Code, § 3447, is shown or can be inferred from the facts, good faith is presumed. *Larsen v. Betcher*..... 247

4. SAME (64-1, 127)—BONA FIDE PURCHASER—NOTICE OF INFIRMITY—FRAUD. An oral agreement to hold a note until it was due unless it was found necessary to use it as collateral is not evidence of any fraud in the inception of the note, nor notice of an infirmity as defined by Rem. Code, § 3447. *Larsen v. Betcher*..... 247

5. SAME (68)—BONA FIDE PURCHASERS — TAKING AS COLLATERAL SECURITY. The transfer of notes to a creditor for the purpose of collecting what he could and applying it on an antecedent debt constitutes a holding as collateral within Rem. Code, §§ 3417, 3418. *Guaranty Security Co. v. Coad*..... 156

6. BILLS AND NOTES (118)—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF — DELIVERY. Under Rem. Code, § 3407, providing that intentional delivery of a note, passed from the maker's possession, will be presumed until the contrary is proven, defendant has the burden of proof and right to open and close, where the note was offered in evidence without objection and defendant admitted his signature and relied upon an affirmative defense. *Spokane State Bank v. Pitner* 177

7. BILLS AND NOTES (124)—EVIDENCE (150)—PAROL—EVIDENCE—ADMISSIBILITY TO VARY CONTRACT. A promissory note may not be varied by parol evidence of an oral agreement that it would be held by the payee until due unless it was found necessary to use it as collateral. *Larsen v. Betcher*..... 247

8. SAME (141)—ACTIONS—EVIDENCE—OWNERSHIP AND PAYMENT OF VALUE. A bank suing on a note taken after maturity and for collection only, cannot claim to be a *bona fide* holder for value. *Spokane State Bank v. Pitner*..... 177

Bona Fide Purchaser:

Of bill or promissory note, see BILLS AND NOTES, 1-5, 8.
Of property obtained by false pretenses, see LARCENY, 1.
Of goods, see SALES, 4.

Bonds:

Supersedeas or stay pending appeal, see APPEAL AND ERROR, 6.
Corporate bonds, purchase or loan of credit, see CORPORATIONS, 8.
Liability and indemnity bonds distinguished, see INSURANCE.
Contractor's bonds, see MUNICIPAL CORPORATIONS, 3, 4.

Breach:

Of contract, see CONTRACTS, 5, 6.
Of covenant against assignment of lease, see LANDLORD AND TENANT, 1-3, 10, 11, 13, 14, 17, 18.
Of conditions of mining lease, see MINES AND MINERALS.
Of contract of sale, see SALES, 1, 2, 5, 7-9.
Of contract for sale of land, see VENDOR AND PURCHASER.

Buildings:

Injury to licensee, see NEGLIGENCE, 1, 4.

Burden of Proof:

In actions on note, see BILLS AND NOTES, 6.

Burglary:

1. BURGLARY (19)—EVIDENCE—SUFFICIENCY—FELONIOUS INTENT ON ENTRY. In a prosecution for burglary, there was sufficient evidence of entry with intent to commit the crime of contributing to the delinquency of a female under the age of eighteen years, where it appears that accused, after being ordered from a hotel at night, reentered by the fire escape, gained access to a room occupied by a girl seventeen years of age, and was found there with others, who were drunk, and that accused had been drinking. *State v. McDermott* 123

Cancellation of Instruments:

Rescission of contract, see CONTRACTS, 3.
Suspension of *lis pendens*, see DIVORCE, 1.
Rescission of contract of sale of land, see VENDOR AND PURCHASER, 5-8.

1. CANCELLATION OF INSTRUMENTS (6, 7)—VENDOR AND PURCHASER (60, 159)—RESCISSION FOR FRAUD. An executed contract for the sale of land may be rescinded for fraud entering into the making of the contract, and the purchaser's remedy is not limited to a suit at law for damages for breach. *French v. C. D. & E. Investment Co.* 416

Cancellation of Instruments—Continued.

2. CANCELLATION OF INSTRUMENTS (7) — EXECUTED CONTRACTS. Where arid lands and water rights in a contract for conveyance are dependent, one upon the other, a deed of the land alone does not make it an executed contract, and bar a cancellation. *French v. C. D. & E. Investment Co*..... 416

Capital Stock:

Purchase with funds of corporation, see CORPORATIONS, 1-5.

Cattle Stealing:

Identity of stolen cattle, see LARCENY, 2.

Certainty:

Of statute in defining offense, see CRIMINAL LAW, 1.
In indictment or information, see INDICTMENT AND INFORMATION, 1.

Certiorari:

To review decision of justice court, see CRIMINAL LAW, 20.

Cessation of Controversy:

On appeal, see APPEAL AND ERROR, 1.

Challenge:

To juror, see JURY, 2.

Change of Venue:

Of criminal prosecutions, see CRIMINAL LAW, 3.
Of civil actions, see VENUE.

Character:

Of witness, see SODOMY; WITNESSES, 6.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 10, 11.
To jury in civil actions, see TRIAL, 3-6.

Charges:

Regulation of charges by gas company, see GAS.

Charities:

Judicial notice as to charitable feature of religious corporations, see EVIDENCE, 1.
Exemption of charitable bequest from inheritance tax, see TAXATION.

Children:

See GUARDIAN AND WARD.
Award of custody on divorce, see DIVORCE, 2.
Places attractive to, see NEGLIGENCE, 2, 3.
Awarding custody of on habeas corpus, see PARENT AND CHILD.

Cities:

See MUNICIPAL CORPORATIONS.

Citizens:

Privileges and immunities, see CONSTITUTIONAL LAW, 5-7.

Civil Rights:

Constitutional guaranty of civil rights, see CONSTITUTIONAL LAW, 4.

Claims:

Against city for personal injuries, see MUNICIPAL CORPORATIONS, 13.

Classification:

Of counties as determining salaries of superior court judges, see COUNTIES, 1.

Class Legislation:

See CONSTITUTIONAL LAW, 5-7.

Coercion:

In making contract, see CONTRACTS, 3.

Cold Storage:

See WAREHOUSEMEN.

Collateral Security:

Holding note as collateral security, see BILLS AND NOTES, 5.

Collision:

Between automobiles on highway, see HIGHWAYS.

Injury to third person struck by automobile, see MASTER AND SERVANT, 8.

Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 12.

Injuries to travelers at railway crossing, see RAILROADS, 2, 3.

Between street cars or with vehicles, see STREET RAILROADS.

Commerce:

Employees engaged in interstate commerce, see MASTER AND SERVANT, 4.

Commitment:

Inquiry into legality of, see HABEAS CORPUS.

Community Property:

See HUSBAND AND WIFE, 2-6.

Tenancy in common, see TENANCY IN COMMON.

Compensation:

Of attorney, see ATTORNEY AND CLIENT.
Attorney's fees in action by stockholder on behalf of corporation, see CORPORATIONS, 5.
Salaries of superior court judges, see COUNTIES, 1.
Pecuniary compensation of injuries caused by unlawful acts of another, see DAMAGES.
For property taken for public use, see EMINENT DOMAIN, 2, 3.
For use of money, see INTEREST.

Competency:

Of juror, see JURY, 1.
Of parent to have custody of child, see PARENT AND CHILD.
Of witnesses in general, see WITNESSES, 1.

Complaint:

Amendment of at trial, see PLEADING, 2.

Completeness:

Of contract as affecting right to specific performance, see SPECIFIC PERFORMANCE, 1.

Compromise and Settlement:

See ACCORD AND SATISFACTION.
Duty to mitigate damages by compromise of claim, see DAMAGES, 2, 3.

Concealment:

Fraudulent concealment, see FRAUD, 1.

Conclusion:

Of witness, see EVIDENCE, 5.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Conditions:

In lease, see LANDLORD AND TENANT.
Precedent to action for breach of contract, see SALES, 1.

Conduct of Counsel:

In criminal prosecution, see CRIMINAL LAW, 9, 21.
As harmless error, see CRIMINAL LAW, 25.

Consent:

Of lessor to assignment of lease, see LANDLORD AND TENANT, 1, 2, 10, 11, 13, 14, 17, 18.

Consolidation:

Of actions, see ACTION.

Constitutional Law:

Cruel and unusual punishment, see CRIMINAL LAW, 27.
Subjects and titles of statutes, see STATUTES, 1.

1. CONSTITUTIONAL LAW (45)—POLICE POWER—NATURE AND SCOPE. The police power includes all regulations designed to promote public convenience, general welfare and property and great public needs, and it is not necessary for the court to find the existence of facts, if a state of facts can be reasonably presumed to exist which would justify the legislation. *Parrott & Co. v. Benson*..... 117

2. SAME (48, 49)—POLICE POWER—REGULATION OF OCCUPATION—REASONABLENESS. Rem. Code, § 5466-1, requiring places using eggs imported from foreign countries to post conspicuous notices of such fact where customers could read them, is not unjust discrimination or an unreasonable restriction, but is within the police power. *Parrott & Co. v. Benson*..... 117

3. CONSTITUTIONAL LAW (53)—PERSONAL RIGHTS—LIBERTY AND SECURITY. The criminal syndicalism act, Laws 1919, p. 518, § 1, subd. 3, making it unlawful for any person to become a member of any group of persons formed to advocate the prohibited acts, is not unconstitutional as unduly infringing the personal liberties of the citizen. *State v. Hennessy*..... 351

4. CONSTITUTIONAL LAW (59) — CIVIL RIGHTS—FREEDOM OF SPEECH. The criminal syndicalism statute, Laws 1919, p. 518, § 1, intended to prevent the teaching of crime, sedition, violence or intimidation as a means of overcoming the present social order is not unconstitutional as abridging the freedom of speech. *State v. Hennessy* 351

5. CONSTITUTIONAL LAW (101, 103) — DRAINS (1)—SPECIAL PRIVILEGES—EQUAL PROTECTION OF THE LAWS. The diking and drainage act, Rem. Code, § 4107, is unconstitutional in that it denies equality and grants special privileges to some which it denies to others, in the provision by which the judgment upon maximum benefits is made final and conclusive as to the landowners, but not as to the commissioners who may as often as they please have the same opened stitutional as abridging the freedom of speech. *State v. Hennessy* 351

6. SAME. The diking and drainage act, Rem. Code, § 4107, is unconstitutional in that it denies equality and grants special privileges to some which it denies to others, in the provision whereby owners of land within the district proper are entitled to vote at elections governing the district and the levy of taxes, while others in the extended area taxed for the improvements have no vote or voice in the matter. *Malm v. Benthien*..... 533

7. CONSTITUTIONAL LAW (102)—PRIVILEGES AND IMMUNITIES—CLASS LEGISLATION. There is nothing on the face of the criminal syndicalism statute, Laws 1919, p. 518, § 1, showing an intention to

Constitutional Law—Continued.

restrict the discussion of economic and industrial questions among labor organizations; but the regulations bear with equal weight upon all in a like situation, and the act is not objectionable as class legislation. *State v. Hennessy*..... 351

Construction:

Of contract of sale, see CONTRACTS, 2.
Of act fixing salaries of superior court judges, see COUNTIES, 1.
Of workmen's compensation act, see MASTER AND SERVANT, 2, 3.
Of statutes, see STATUTES, 3.
Of contract for sale of land, see VENDOR AND PURCHASER, 1, 4.

Contempt:

Review of conviction by habeas corpus, see HABEAS CORPUS.

1. CONTEMPT (8)—INJUNCTION (73)—VIOLATION OF ORDER—NOTICE TO PARTY OR OTHER PERSON. A person not a party cannot be punished for contempt in violating an injunction unless he had notice thereof; and a finding that a member of the I. W. W. had notice of an injunction directed against members of the order is not sustained where it merely appears that copies had been posted in numerous places in the county, and the decree given newspaper publicity, there being nothing to show that the member had been in the county for more than two days. *State ex rel. Lindsley v. Grady*..... 692

Contingent Fees:

See ATTORNEY AND CLIENT.

Continuance:

In criminal prosecutions, see CRIMINAL LAW, 6.

Contractors:

Bonds of on public works, see MUNICIPAL CORPORATIONS, 3, 4.

Contracts:

See ACCORD AND SATISFACTION.
Rendering abstracter liable, see ABSTRACTS OF TITLE, 1.
For attorney's fees, see ATTORNEY AND CLIENT.
Parol evidence to vary contract, see BILLS AND NOTES, 7.
Cancellation, see CANCELLATION OF INSTRUMENTS.
Authority of corporate officer to make, see CORPORATIONS, 7.
With power companies, regulation of rates, see ELECTRICITY.
Acceptance of benefits under as estoppel, see ESTOPPEL.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of guardian, see GUARDIAN AND WARD.
Of infants, see INFANTS, 1.
Of guardian *ad litem*, see INFANTS, 2.
Of insurance in general, see INSURANCE.

Contracts—Continued.

Creation of equitable lien, see LIENS.
Sale of logs, see LOGS AND LOGGING.
For public improvements, see MUNICIPAL CORPORATIONS, 3, 4.
Creation of relation, see PARTNERSHIP, 2.
Party-wall agreements, see PARTY-WALLS.
Sales of personalty, see SALES.
Shipping articles, see SEAMEN.
Specific performance, see SPECIFIC PERFORMANCE.
Sale of land, see VENDOR AND PURCHASER.
Water rights, see WATERS AND WATER COURSES, 2.

1. CONTRACTS (8) — REQUISITES AND VALIDITY—AGREEMENT TO MAKE CONTRACT IN FUTURE. Where the parties, when they met pursuant to appointment, contemplated a formal and complete contract of sale of a moving picture business, their prior correspondence containing a proposal and acceptance of the terms offered, to be closed shortly, did not constitute a completed contract, as there was no meeting of minds. *Jammie v. Robinson*..... 275

2. CONTRACTS (12)—EVIDENCE OF AGREEMENT—REASONABLENESS. Upon an issue as to the terms of an oral contract for employment, it is admissible to prove the reasonable value of the services as tending to show the probability of the making of the contract. *LeDoux v. Seattle North Pacific Shipbuilding Co*..... 632

3. CONTRACTS (36-1)—CORPORATIONS (56)—REQUISITES AND VALIDITY —VALIDITY OF ASSENT—DURESS—RESCISSION OF SALE OF CORPORATE STOCK. A transfer of shares of stock in a corporation will not be cancelled for duress and coercion, upon plaintiff's evidence that it was made under threats of prosecution for making false entries and appropriating money and merchandise to his own use, where he was not restrained of his liberty, and came and went at his will for several days and of his own volition sought to settle the matter. *Cooley v. Davis*..... 196

4. CONTRACTS (67)—EVIDENCE (168)—PRIOR ORAL AGREEMENTS COLLATERAL TO WRITTEN CONTRACT. In an action upon contracts, where there was nothing inconsistent between written and oral agreements between the parties and their subject-matter was not the same, it is proper to refuse a requested instruction to the effect that there could be no recovery unless the oral agreement was subsequent to the writing. *Bayers v. Barry*..... 252

5. CONTRACTS (110, 154)—MODIFICATION — MERGER — BREACH — ACTS CONSTITUTING. Whether a contract for railroad construction work was indefinite or not, the parties had a right to modify it, hence it is not a breach to fail to perform the original contract but the breach is by the party failing to perform his part of the modified contract. *Skoug v. Latour Creek R. Co*..... 516

Contracts—Continued.

6. CONTRACTS (157, 159) — BREACH — WAIVER — RIGHTS ON PARTIAL PERFORMANCE. Where railroad contractors notified the company that they could not complete the contract, whereupon the company agreed to modify the contract upon plaintiff's purchasing his partner's interest, which was done and plaintiff resumed the work under the modified contract, he is entitled to the reasonable value of the work done. *Skoug v. Latour Creek R. Co*..... 516

7. CONTRACTS (181) — EVIDENCE OF AGREEMENT — QUESTION FOR JURY. The positive testimony of a party that he had entered into an oral contract with defendant is sufficient to take the case to the jury. *LeDoux v. Seattle North Pacific Shipbuilding Co*..... 632

Contributory Negligence:

In turning to left to avoid collision, see HIGHWAYS.
Of child, see NEGLIGENCE, 3.
Of licensee in falling down stairway, see NEGLIGENCE, 4.
Of driver of truck at crossing, see RAILROADS, 3.
Of driver of auto truck, see STREET RAILROADS.

Conveyances:

In fraud of creditors, see FRAUDULENT CONVEYANCES.
Between husband and wife, see HUSBAND AND WIFE, 1.
By tenant in common of community property, see TENANCY IN COMMON.
Water rights, see WATERS AND WATER COURSES, 2.

Convicts:

Nature and extent of punishment, see CRIMINAL LAW, 26, 27.

Corporations:

See MUNICIPAL CORPORATIONS.
Rescission of sale of stock for duress and coercion, see CONTRACTS, 3.

1. CORPORATIONS (29, 69) —CAPITAL STOCK—INCREASE—STOCK DIVIDENDS. Majority stockholders who negotiated for and purchased outstanding stock and paid for it out of the funds of the corporation cannot sustain the transaction as a stock dividend, where it was not newly issued stock, and where there was no showing of a financial status authorizing a dividend equal to the value of the stock. *Joyce v. Congdon* 239

2. CORPORATIONS (87) — STOCKHOLDERS — SUING ON BEHALF OF CORPORATION. A minority stockholder may maintain an action in behalf of himself and others similarly situated where the majority stockholders acquired stock and paid for it out of the funds of the company. *Joyce v. Congdon*..... 239

Corporations—Continued.

3. SAME (87)—STOCKHOLDERS—RIGHT TO SUE ON BEHALF OF CORPORATION. One purchasing stock from wrongdoers who acquired the stock through use of funds of the corporation, knowing of the wrong, cannot, as a minority stockholder, complain of the manner in which it was acquired. *Joyce v. Congdon*..... 239

4. SAME (87-90) — SUIT ON BEHALF OF CORPORATION — JUDGMENT. Where plaintiff stockholder is the only one who will be benefited by his attack upon the corporation paying for stock distributed to majority stockholders, judgment was properly entered in his favor individually for the amount of his loss. *Joyce v. Congdon*..... 239

5. SAME (87-90)—SUIT ON BEHALF OF CORPORATION—ATTORNEY'S FEES. Expenses and attorney's fees should not be allowed a minority stockholder who brought an action attacking the use of corporate funds in the acquisition of stock by majority stockholders, where the recovery was for the benefit of the plaintiff individually and not for the corporation. *Joyce v. Congdon*..... 239

6. CORPORATIONS (128, 129)—OFFICERS AND AGENTS—DEALINGS WITH AND FRAUD AS AGAINST CORPORATION OR SHAREHOLDERS. A banker's demand in temporary control of a corporation, to be reimbursed for interest, and a note given therefor, is not fraudulent, where he was trustee for a new corporation organized to help another out of difficulties, and agreed to "take" bonds of the new corporation at par, and borrowed money thereon to secure a working capital, at a higher interest rate than borne by the bonds; his demand for reimbursement for the difference in interest being acceded to by the adverse interest. *Hill v. Walville Lumber Co*..... 476

7. CORPORATIONS (155, 162, 169) — REPRESENTATION — CONTRACTS—APPARENT AUTHORITY—EVIDENCE—SUFFICIENCY. Where the by-laws of a corporation do not authorize the secretary-treasurer to make a contract for the company, the company is not liable unless it was within the apparent authority which he assumed with the knowledge of the company; and the question is one for the jury where he was the officer in chief control of the company and to a large extent managed and directed extensive operations running into many millions of dollars, that he employed and placed on the pay roll two men as general and assistant superintendent for the construction of a plant at $300 per month, and further entered into an agreement with them for additional compensation of seven and one-half per cent of the construction cost, if the company should be successful. *LeDoux v. Seattle North Pacific Shipbuilding Co*..... 632

8. SAME (189-1)—CORPORATE BONDS — PURCHASE OF BONDS—OR LOAN OF CREDIT. There was not an actual purchase of bonds, but a mere loan of credit to a corporation which was bound to make reimbursement of the difference between the interest paid on the bonds and on

Corporations—Continued.

money borrowed thereon, where a banker and associates agreed to "take" at par the bonds of a new corporation, which took over assets of another in difficulties, the banker to have temporary control of the corporation and to borrow money for a working capital, the matter being referred to as an "underwriting." *Hill v. Walville Lumber Co.* 476

Correction:

Of judgment, see JUDGMENT, 3, 4.

Costs:

As element of damages, see DAMAGES, 4.

1. COSTS (61) — ON APPEAL—SUCCESSFUL PARTY. A wife, appearing separately to defend her separate estate, is entitled to costs upon obtaining a reversal on her separate appeal prosecuted by her separate funds; and such costs cannot be offset against costs allowed in the original action. *Dart v. McDonald* 448

Cotenancy:

See TENANCY IN COMMON.

Counties:

Liability for flooding lands, see WATERS AND WATER COURSES, 1.

1. COUNTIES (4)—CLASSIFICATION—STATUTES—CONSTRUCTION. Under Laws 1919, p. 154, § 1, fixing the salary of all superior court judges in the state at $4,500, with the proviso that judges in counties of the first class shall receive a salary of $5,000, judges in "class A" counties are not within the proviso, in view of Laws 1919, p. 490, § 1, declaring that counties of 210,000 population shall be known as "Class A" and of 125,000 to 210,000 as "first class" counties; since there is no ambiguity in the act or room to resort to construction. *State ex rel. Ronald v. Clausen* 520

2. COUNTIES (57, 58) — LIABILITIES — TORTS — GOVERNMENTAL FUNCTIONS — PUBLIC IMPROVEMENTS. A county is not strictly a municipal corporation or within the rule of nonliability for damages brought about in the performance of governmental functions; and hence is liable in tort for flooding land in doing road work. *Whiteside v. Benton County* 463

Courts:

Review of decisions, see APPEAL AND ERROR.
Contempt of court, see CONTEMPT.
Review in criminal cases, see CRIMINAL LAW, 20-25.
Money deposited in court, see DEPOSITS IN COURT.
Jurisdiction and proceedings in suits for divorce, see DIVORCE.
Judicial notice, see EVIDENCE, 1.

Courts—Continued.

Review in habeas corpus, see HABEAS CORPUS.
Authority to amend or correct judgment in same court, see JUDGMENT, 3, 4.
Conclusiveness of judgments, see JUDGMENT, 5-7.
Scope and extent of relief on partition, see PARTITION.
Property in *custodia legis*, see RECEIVERS.

Covenants:

Against assignment of leased premises, see LANDLORD AND TENANT, 1-3, 10, 11, 13, 14, 17, 18.
Dependent covenants in contract for sale of land, see VENDOR AND PURCHASER, 7.

Credibility:

Of witness, see WITNESSES, 6-8.

Credit:

Loan of to corporation, see CORPORATIONS, 8.

Creditors:

See FRAUDULENT CONVEYANCES.

Criminal Law:

See BURGLARY; CONTEMPT; FORGERY; INSURRECTION; LARCENY; RAPE; ROBBERY; SEDUCTION; SODOMY; TREASON.
Constitutional guaranties of personal liberty and security, see CONSTITUTIONAL LAW, 3.
Prosecution for unlawful killing of elk, see GAME.
Review of conviction by habeas corpus, see HABEAS CORPUS.
Allegations in indictment, see INDICTMENT AND INFORMATION.
Violation of liquor laws, see INTOXICATING LIQUORS.
Competency and challenge to jurors, see JURY.
Trial of civil actions, see TRIAL.
Necessity for written instructions, see TRIAL, 3.

1. CRIMINAL LAW (3-1)—STATUTORY PROVISIONS—CREATION AND DEFINITION OF OFFENSES. The criminal syndicalism act, Laws 1919, p. 518, § 1, is not void for indefiniteness in that the phrase "or which will tend to encourage disrespect for the law" is uncertain. *State v. Hennessy* 351

2. CRIMINAL LAW (27) — JURISDICTION — LOCALITY OF OFFENSE. The criminal syndicalism act, Laws 1919, p. 518, § 1, makes it an offense to "be a member" of a group of persons formed to advocate certain prohibited things, regardless of the county in which accused "joined" the organization; hence, although one joined in Y. county, he may be informed and proceeded against in the county in which he was found and committed the prohibited acts. *State v. Hennessy* 351

Criminal Law—Continued.

3. CRIMINAL LAW (36)—VENUE—CHANGE—LOCAL PREJUDICE. Prejudicial error cannot be predicated on denying a motion for change of venue on account of local prejudice, where both sides were permitted to excuse any juror living in localities where there was a possibility of prejudice. *State v. Muller*..... 660

4. CRIMINAL LAW (112) — EVIDENCE — OTHER OFFENSES — PROOF AND EFFECT. In a prosecution for arson, an objection to a paper on the ground that it tended to show a forgery by the accused, is not well taken where the evidence tended to show without dispute that the paper was signed by a third person and the only question in issue was whether such third person was authorized to sign another's name to the paper. *State v. Wilcox*..... 14

5. SAME (131) — EVIDENCE — ADMISSION — BY ACCUSED TO PEACE OFFICER. In a prosecution for sodomy, it is admissible for the officer making the arrest to testify that accused admitted having seen the complaining witness on the day in question in the vicinity of the place where the crime was alleged to have been committed. *State v. Demas* 596

6. CRIMINAL LAW (191)—CONTINUANCE—GROUNDS—DISCRETION. It is discretionary to deny a continuance in a criminal case for want of necessary witnesses, and not error where the affidavits did not sufficiently comply with Rem. Code, § 2135. *State v. Wallace*..... 586

7. CRIMINAL LAW (213)—TRIAL—VIEW OF PREMISES—DISCRETION OF COURT. Whether the jury in a criminal case shall be permitted to view the premises is entirely discretionary. *State v. Demas*.... 596

8. CRIMINAL LAW (224) — TRIAL — COMPELLING CALLING OF WITNESS. The state is not required to call all the witnesses indorsed on the information, and error cannot be assigned thereon. *State v. Muller*. 660

9. CRIMINAL LAW (244)—TRIAL—MISCONDUCT OF ATTORNEY—CORRECTION BY COURT. Error cannot be predicated upon misconduct of the prosecuting attorney in his closing address, where, upon exceptions taken, the trial court instructed the jury to disregard any statement which was not borne out by the evidence. *State v. McDermott* 123

10. CRIMINAL LAW (301) — TRIAL — INSTRUCTIONS — FORM AND LANGUAGE. It is not error to refuse a request to address the instructions to each juror individually, where correct general instructions to the jury as a body covered the question. *State v. Ely*..... 185

11. SAME (314) — TRIAL — MISLEADING INSTRUCTIONS—REQUESTS—SPECIAL ISSUES—ABSTRACT INSTRUCTIONS. An instruction to acquit if the jury can reconcile the evidence upon any reasonable hypothesis consistent with innocence, sufficiently covers a requested instruction to acquit, if the evidence raises a reasonable doubt that the

Criminal Law—Continued.

charge made by the prosecuting witness was induced by nervousness or a mistake; especially where the requested instruction would have been misleading. *State v. Ely*..... 185

12. CRIMINAL LAW (347)—MOTION FOR NEW TRIAL — MISCONDUCT AFFECTING JURORS. Affidavits of a juror stating facts constituting misconduct, but not attempting to state what effect it had on the jury, do not come within the rule that a juror will not be heard to impeach his own verdict. *State v. McChesney*..... 113

13. SAME. Misconduct of a juror will not be considered as ground for a new trial where the affidavit of the juror denies the alleged misconduct. *State v. McChesney*..... 113

14. SAME. A new trial in a prosecution for stealing cattle must be granted, where one of the jurors admitted to the making of statements in the jury room as to his loss of cattle, traced to the vicinity of the defendant's residence, which were entirely outside of the evidence and might be extremely prejudicial. *State v. McChesney*.. 113

15. SAME (355)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE IN GENERAL—ARSON. In a prosecution of the president of a company for arson, evidence with reference to the financial condition of the company at all times known to the accused, cannot be newly discovered evidence. *State v. Wilcox*..... 14

16. SAME (356)—NEW TRIAL—DILIGENCE. A new trial will not be granted for the purpose of introducing evidence which plaintiff had ample opportunity to produce at the trial. *State v. Wilcox*..... 14

17. CRIMINAL LAW (356)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial on account of newly discovered evidence should not be granted where the accused knew of the evidence before the trial and simply failed to find the witness and did not have any subpoena issued for him, since there was lack of diligence. *State v. McChesney*..... 208

18. CRIMINAL LAW (358)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ACCUMULATIVE EVIDENCE. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, nor where the only purpose is to meet or discredit evidence produced at the trial. *State v. Wilcox*..... 14

19. CRIMINAL LAW (358)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. It is not an abuse of discretion to deny a new trial for newly discovered evidence of another witness to establish an alibi, testified to at the trial by two relatives and another disinterested witness, where, after the state elected as to the date, the accused was given an adjournment to meet the evidence. *State v. Parker*. 428

20. CRIMINAL LAW (380)—CERTIORARI (11) — NATURE AND GROUNDS — REVIEW OF DECISION OF JUSTICE COURT—DISMISSAL OF CRIMINAL CASE.

Criminal Law—Continued.

Certiorari lies at the instance of the state or city to review the action of a justice of the peace in sustaining a demurrer to a criminal complaint for the violation of an ordinance and dismissing the accused, under Rem. Code, § 1002, authorizing a writ of review to review illegal acts or correct an erroneous proceeding not according to the course of the common law where there is no adequate remedy at law. *State ex rel. Brown v. Brinker* 47

21. CRIMINAL LAW (388)—APPEAL—NECESSITY OF OBJECTIONS—ARGUMENTS OF COUNSEL. Error cannot be assigned upon improper conduct of counsel for the state in his address to the jury where no objection was made or any request to instruct the jury to disregard it. *State v. Muller* 660

22. CRIMINAL LAW (444)—APPEAL—HARMLESS ERROR—RULING AS TO INFORMATION. Error cannot be predicated upon refusing to strike from an information for seduction allegations of persuasion and fraudulent means, as to which no evidence was given, where the opening statement of the prosecuting attorney limited the means of seduction relied on to the promise of marriage; Rem. Code, § 2137, making the law relating to civil trials applicable, and Id., § 339, requiring plaintiff to state the cause of action and evidence to sustain it. *State v. Parker* 428

23. CRIMINAL LAW (444)—APPEAL—REVIEW—HARMLESS ERROR. Error in setting a case for trial without strict compliance with statutory requirements is cured by resetting the case for a later date. *State v. Wallace* 586

24. CRIMINAL LAW (448)—APPEAL—HARMLESS ERROR—EVIDENCE. Error in admitting in evidence a revolver thought to be the one used by accused in an attempted robbery would not be prejudicial, where it was similar to the one used. *State v. Jensen* 401

25. CRIMINAL LAW (451)—APPEAL—HARMLESS ERROR—ARGUMENTS AND CONDUCT OF COUNSEL. It is not prejudicial misconduct for the prosecuting attorney to announce that the state waives any criminal prosecution, upon the accused's refusing to answer a question on the ground that it might tend to incriminate him, when the court was not requested to specially advise the jury to disregard it. *State v. Ely* 185

26. CRIMINAL LAW (460)—PUNISHMENT OF SECOND AND SUBSEQUENT OFFENSES—PROCEDURE—SENTENCE. Rem. Code, § 2286, providing for the punishment of habitual criminals who have twice before been convicted of felony, is not a supplemental but a cumulative proceeding, and does not require the charge of a substantive crime; and after a third conviction, the charge of being an habitual criminal is an independent charge which may be tried before a judge of another department of the court, before sentence on the third felony

Criminal Law—Continued.

charge; and after conviction of being an habitual criminal, the accused may be sent back for sentence to the judge who tried the last felony charge. *State v. Kelch*..... 601

27. CRIMINAL LAW (461) — PUNISHMENT — CRUEL AND UNUSUAL. The criminal syndicalism act, Laws 1919, p. 518, § 1, making certain acts a felony without prescribing the penalty and leaving the same subject to the general law in such case, Rem. Code, § 2265, which prescribes a penalty of not to exceed ten years in the penitentiary, or a fine not exceeding $5,000, or both, is not unconstitutional as providing cruel or unusual punishment. *State v. Hennessy*..... 351

Criminal Syndicalism:

Validity of act, see CONSTITUTIONAL LAW, 3, 4, 7; CRIMINAL LAW, 27.
Certainty of statute in defining crime, see CRIMINAL LAW, 1.
Sufficiency of accusation, see INDICTMENT AND INFORMATION, 1, 4.
Intent as element of offense, see INSURRECTION.
Sufficiency of title of act, see STATUTES, 1.
Act as attempt to punish for treason, see TREASON.

Crops:

Right of farm laborer to lien, see AGRICULTURE.

Cross-Examination:

See WITNESSES, 2-5.
Presumptions as to rulings on, see APPEAL AND ERROR, 7.

Crossings:

Highway crossings, see RAILROADS, 1.
Accidents at railroad crossings, see RAILROADS, 2, 3.
Accident at street railroad crossings, see STREET RAILROADS.

Cumulative Evidence:

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 18, 19.
Reception at trial, see TRIAL, 1.

Custody:

Support and custody of children, see DIVORCE, 2.
Of children, see PARENT AND CHILD.

Damages:

Condemnation of property taken for public use, see EMINENT DOMAIN, 2, 3.
For fraud, see FRAUD, 5.
Liability or indemnity insurance, see INSURANCE.
Unlawful detainer, see LANDLORD AND TENANT, 15-17.
Breach by seller of contract for sale of goods, see SALES, 7, 9.

Damages—Continued.

For negligence of telephone company, see TELEGRAPHS AND TELEPHONES.

Evidence of value of land received in trade, see VENDOR AND PURCHASER, 3.

Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 9, 10.

Injuries by flooding land, see WATERS AND WATER COURSES, 1, 3-5.

1. DAMAGES (18, 19)—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES — ANXIETY OR MENTAL DISTRESS — HUMILIATION. Compensatory damages may be recovered in an action for wrongfully excluding a negro from seats in a theater, for the personal indignity inflicted and the mental suffering from the feeling of humiliation and disgrace engendered. *Anderson v. Pantages Theatre Co*..... 24

2. DAMAGES (26)—MITIGATION AND REDUCTION OF LOSS — DUTY TO COMPROMISE. In an action to quiet title to land held by plaintiff under a tax title, plaintiff's offer to release his interest upon defendant's payment of $450, does not require the defendant to pay that sum and thereby mitigate his damages from the loss of the land, which was worth more than twice that amount, in order to recover his loss from an abstracter liable to defendant therefor on account of an untrue statement in the abstract. *Murphy v. Fidelity Abstract and Title Co*..... 77

3. SAME. In an action against an abstracter for damages on account of an untrue statement in the abstract, defendant cannot plead, in mitigation of damages, that plaintiff could have compromised the claim by paying $450, and failed to give defendant an opportunity to pay the same, where it appears that defendant would have unhesitatingly refused to make such payment. *Murphy v. Fidelity Abstract and Title Co*..... 77

4. SAME (30) — GROUNDS OF COMPENSATORY DAMAGES — ATTORNEY'S FEES. In an action against an abstracter for making an untrue statement, resulting in the loss of the land, plaintiff may recover reasonable attoney's fees and expenses in defending a suit brought against him to quiet title, where he was fully warranted in defending the suit. *Murphy v. Fidelity Abstract and Title Co*..... 77

5. DAMAGES (57)—INJURY TO REAL PROPERTY—DAMAGES FROM OVERFLOW. The measure of damages from overflowing a tract of land is the difference between the value of the tract immediately before and immediately after the injury; and not the injury to the particular part submerged. *Whiteside v. Benton County*..... 463

6. DAMAGES (80)—EXCESSIVE DAMAGES—INJURY TO PERSON. A verdict for $2,000 damages sustained in an automobile collision is not excessive where the car was badly damaged, and both husband and

Damages—Continued.

wife were seriously injured, one sustaining a broken arm, bruises and other injuries, and the other two fractured ribs, and injury to chest, back and arm. *Shelley v. Norman*..... 381

7. DAMAGES (84)—EXCESSIVE DAMAGES—PERSONAL INJURIES—INJURY TO LEG OR FOOT. A verdict for $1,750 for injuries sustained by a boy ten years old, is not excessive where he sustained a broken tibia at the ankle joint and was permanently injured. *Hutchins v. School District No. 81 of Spokane County*..... 548

8. SAME (90)—INADEQUATE AND EXCESSIVE DAMAGES—TO REPUTATION AND FEELINGS. A verdict for $300 for indignities inflicted in excluding a negro from seats in a theater will not be held excessive, where it occurred at a public place in the presence of a large number of people and was of an aggravated sort. *Anderson v. Pantages Theatre Co.*..... 24

9. DAMAGES (104, 124)—PLEADING, EVIDENCE AND ASSESSMENT—LIMITATION AS TO AMOUNT—INSTRUCTIONS. It is reversible error for the court to instruct the jury that the maximum sum to be allowed in an action for damages is the amount claimed in the pleadings without limiting such recovery to the maximum amount shown by the evidence, where the testimony shows the latter to be less than the amount specified in the pleadings. *Caldbick v. Marysville Water & Power Co.*..... 562

10. DAMAGES (112)—EVIDENCE—ADMISSIBILITY—DAMAGE TO PROPERTY FROM FLOODING. An offer of evidence to show that a responsible party undertook to rent property from respondent in 1919 after alleged damage had been done by flooding, is properly denied where the damages claimed are not for loss of crops for the year 1919 but for decrease in the market value of the property by reason of the flooding. *Caldbick v. Marysville Water & Power Co.*..... 562

Death:

Of partner, see PARTNERSHIP, 3.

Debt:

Revival of debt discharged, see BANKRUPTCY.
Notes given for pre-existing debt, see BILLS AND NOTES, 1, 5.
Separate or community debts, see HUSBAND AND WIFE, 5, 6.

Debtor and Creditor:

See BANKRUPTCY; FRAUDULENT CONVEYANCES.
Creditor as *bona fide* holder of notes, see BILLS AND NOTES, 1, 2, 5.

Decedents:

Estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; PARTNERSHIP, 3.
Testimony as to transactions with persons since deceased, see WITNESSES, 1.

Deceit:

See FRAUD.

Decision:

Former decisions as controlling, see JUDGMENT, 5-7.

Deeds:

Separate property of married women, see HUSBAND AND WIFE, 2.
Water rights, see WATERS AND WATER COURSES, 2.

Delivery:

Of promissory note, presumptions, see BILLS AND NOTES, 6.
Of goods sold within statute of frauds, see FRAUDS, STATUTE OF, 1.
On sale of logs, see LOGS AND LOGGING.
Of goods sold, see SALES, 1, 7.

Demand:

Interest on unliquidated demand, see INTEREST.

Demurrer:

Conclusiveness of judgment on, see JUDGMENT, 5.
Waiver of, see PLEADING, 1.

Deposits:

In bank, see BANKS AND BANKING.

Deposits in Court:

1. DEPOSITS IN COURT (3) — RIGHTS AND LIABILITIES OF PARTIES. Money deposited in court as rent due for premises pending an appeal in an action for unlawful detainer, in which the judgment of the court found that the rent was due the plaintiff, is properly ordered paid to the plaintiff, when the judgment was not superseded on the appeal. *Kuwabara v. Gazzam* 75

Descent and Distribution:

Inheritance and transfer taxes, see TAXATION.

1. DESCENT AND DISTRIBUTION (7) — VESTING OF TITLE. Upon the death of one spouse without leaving a will, one-half of the community property immediately vests in the children, who become tenants in common with the surviving parent. *Goulette v. Goulette* 689

Devises:

See WILLS.

Dikes:

Diking and drainage act as granting special privileges, see CONSTITUTIONAL LAW, 5, 6.

Diligence:

Affecting right to new trial, see CRIMINAL LAW, 16, 17.

Disabilities:

Permanent or partial, under workmen's compensation act, see MASTER AND SERVANT, 2, 3.

Discharge:

From indebtedness, see ACCORD AND SATISFACTION.
Revival of debt by new promise, see BANKRUPTCY.
Habeas corpus to compel discharge of defendant, see HABEAS CORPUS.
From liability as insurer, see INSURANCE, 2.

Discretion of Court:

Continuance, see CRIMINAL LAW, 6.
View of premises in criminal case, see CRIMINAL LAW, 7.
New trial, see NEW TRIAL, 1.
To allow amendment of pleading, see PLEADING, 2.
Cross-examination of witness, see WITNESSES, 2-5.

Discrimination:

Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW, 5-7.
Against persons by reason of color, see THEATERS AND SHOWS; TORTS.

Dismissal and Nonsuit:

Dismissal of appeal, see APPEAL AND ERROR, 1, 5.
Judgment of dismissal as res adjudicata, see JUDGMENT, 6.

Dividends:

On corporate stock, see CORPORATIONS, 1.

Divorce:

Effect of conveyance pending action for, see FRAUDULENT CONVEYANCES, 1.
Commitment for contempt for failure to pay alimony, see HABEAS CORPUS.
Implied repeal of divorce statute by act relating to *lis pendens*, see STATUTES, 2.

1. DIVORCE (58)—LIS PENDENS (6, 7)—CANCELLATION OR MODIFICATION—OPERATION AND EFFECT. Under Rem. Code, § 998, providing that, pending an action for divorce, the court may make proper orders for the disposition of the property, the court has power to order the renewal of a mortgage upon property affected by a notice of lis pendens and to suspend the operation of the lis pendens to the extent of effecting such renewal freed from plaintiff's claim under the lis pendens; such an order not being in any just sense a cancellation of the lis pendens. *Carney v. Carney*..... 268

Divorce—Continued.

2. DIVORCE (100, 104)—CUSTODY AND SUPPORT OF CHILDREN—GROUNDS FOR AWARD OF CUSTODY—MODIFICATION. It is error to dismiss an application to modify a decree of divorce with reference to the custody of minor children, without evidence, for the reason that a similar application made a few months before had been denied on the merits, and because of indefiniteness in the allegations, where it was alleged that conditions had changed and the welfare of the children was at stake. *Ericson v. Ericson* 485

Domicile:

Evidence of residential qualification of administrator, see EXECUTORS AND ADMINISTRATORS, 1.

Of widow as affecting right to allowance, see EXECUTORS AND ADMINISTRATORS, 3.

Drains:

Diking and drainage act as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5, 6.

Obstruction of natural drainage, see WATERS AND WATER COURSES, 1

Duplicity:

Of information, see FORGERY; INDICTMENT AND INFORMATION, 3, 4.

Duress:

Affecting validity of contract, see CONTRACTS, 3.

Eggs:

Regulating use of foreign eggs as exercise of police power, see CONSTITUTIONAL LAW, 2.

Ejectment:

Recovery of leased premises, see LANDLORD AND TENANT, 9-18.

Election:

To renew lease, see LANDLORD AND TENANT, 5, 6.

Electricity:

1. ELECTRICITY (1) — STATUTORY REGULATION — CONTRACTS WITH POWER COMPANIES—RATES—REASONABLENESS—POWER OF PUBLIC SERVICE COMMISSION—ORDER. Under Rem. Code, §§ 8626-27, 8626-28 and 8626-34, providing for reasonable rates for electrical companies and change of the same upon hearings before the public service commission, the law contemplates that the commission may by direct order terminate contracts which were outstanding at the effective date of the law; but as to contracts entered into subsequent to the going into effect of the law, it is not necessary to first obtain the affirmative consent of the commission to the filing of a new schedule increasing the rates to meet the situation where changed conditions make the increase necessary. *North Coast Power Co. v. Public Service Commission* 102

Eminent Domain:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 3-8.

1. EMINENT DOMAIN (39)—NECESSITY FOR CONDEMNATION—FEASIBILITY OF OTHER ROUTE—EVIDENCE—SUFFICIENCY. A reasonable necessity for the condemnation of a right of way for an irrigation ditch is shown, as against a claim of another feasible route, where it appears that the cost of such other route would be entirely disproportionate to the benefits and was impracticable. *State ex rel. Ballard v. Superior Court* 663

2. EMINENT DOMAIN (59)—COMPENSATION—CONTINGENT OR PROSPECTIVE CONSEQUENCES OR LOSSES—PARTY WALLS. Upon condemnation of land up to a party wall, which was owned by the builder, the other owner having merely an option to use it on paying half the cost, the builder's damage is a matter of speculation and conjecture, where there is nothing to show any intention to use and pay for the wall. *Walla Walla v. Jensen Co*..... 134

3. SAME (89, 127)—COMPENSATION—MEASURE AND AMOUNT—LIMITED ESTATES—VALUE OF PARTY WALL. Upon the condemnation of a lot up to the line of a party wall, built and owned by one of the parties, the measure of damages is the amount above the actual value that a purchaser, willing but not compelled to buy, would pay for either piece of property for any purpose by reason of a party wall agreement giving the owner of the land condemned the option to use the wall on paying half its cost. *Walla Walla v. Jensen Co*..... 134

Employees:

See MASTER AND SERVANT.

Employers' Liability Act:

See MASTER AND SERVANT, 4.

Entry:

Of judgment, see JUDGMENT, 2-4.

Equal Protection of Laws:

See CONSTITUTIONAL LAW, 5-7.

Equitable Estoppel:

See ESTOPPEL.

Equity:

See CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.
Equitable estoppel, see ESTOPPEL.
Equitable liens, see LIENS.
Relief in partition, see PARTITION.
Creation of trusts, see TRUSTS.

Estates:

Decedents' estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.
Of deceased partner, see PARTNERSHIP.
Tenancy in common, see TENANCY IN COMMON.
Trust estates, see WILLS, 2.

Estoppel:

Of wife to contest husband's lease of community property, see HUSBAND AND WIFE, 3, 4.
Of infant to avoid contract, see INFANTS, 1.
By judgment, see JUDGMENT, 5-7.

1. ESTOPPEL (52, 53)—EQUITABLE ESTOPPEL—ACCEPTANCE OF BENEFITS—CONTRACTS. A client who permits an attorney to spend time and money under a contract for a contingent fee and accepts the benefits of the contract is estopped to assert its invalidity on the ground that it was solicited and against public policy. *Beck v. Boucher*..... 574

Evidence:

See RAPE.
Presumptions on appeal as to rulings on, see APPEAL AND ERROR, 7.
Harmless error on appeal, see APPEAL AND ERROR, 9-11.
To show special deposit in bank, see BANKS AND BANKING.
Of fraud in inception of note, see BILLS AND NOTES, 4.
In action on bill or note, see BILLS AND NOTES, 7, 8.
In prosecution for burglary, see BURGLARY.
Showing contract made under duress, see CONTRACTS, 3.
Of agreement of parties to contract, see CONTRACTS, 2, 4, 7.
Authority of corporate officer or agent, see CORPORATIONS, 7.
Other offenses, see CRIMINAL LAW, 4.
Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 15-19; NEW TRIAL, 2.
Harmless error in admission of, see CRIMINAL LAW, 24.
Of damages, see DAMAGES, 9, 10.
Necessity for condemnation for right of way for irrigation ditch, see EMINENT DOMAIN, 1.
Residence of surviving partner for purpose of qualification to administer property, see EXECUTORS AND ADMINISTRATORS, 1.
Value of property set aside to widow, see EXECUTORS AND ADMINISTRATORS, 4, 5.
In action for fraud, see FRAUD, 3, 4.
Payment of outlawed debt as fraud on creditors, see FRAUDULENT CONVEYANCES, 2.
Of justification in unlawful killing of elk, see GAME, 2, 3.
Separate property of married woman, see HUSBAND AND WIFE, 1.
Community character of property, see HUSBAND AND WIFE, 2.
Value of ground rent, see LANDLORD AND TENANT, 7, 8.

Evidence—Continued.

In action for unlawful detainer by tenant, see LANDLORD AND TENANT, 12-14.
Identity of stolen cattle, see LARCENY, 2.
Of sale of logs, see LOGS AND LOGGING, 2.
Of employment, see MASTER AND SERVANT, 1.
Of negligence in general, see NEGLIGENCE.
Verdict or findings contrary to evidence, see NEW TRIAL, 1.
Competency of parent to custody of child, see PARENT AND CHILD.
Existence of partnership, see PARTNERSHIP, 2.
Identity of gun used, see ROBBERY.
Of breach of warranty of quality of goods, see SALES, 5.
For breach of contract of sale, see SALES, 8.
Proof of offense, see SEDUCTION.
Negligence causing injuries to persons on or near tracks, see STREET RAILROADS.
Exemption of charitable bequest from inheritance tax, see TAXATION.
Reception at trial, see TRIAL, 1.
Objections to evidence at trial, see TRIAL, 2.
Resulting trust, see TRUSTS.
Of damage on trade of lands, see VENDOR AND PURCHASER, 3.
In action to rescind contract, see VENDOR AND PURCHASER, 5.
In actions by or against warehousemen, see WAREHOUSEMEN.
For damages from seepage from irrigation ditch, see WATERS AND WATER COURSES, 3.
Testamentary capacity, see WILLS, 1.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.
Admissibility of evidence as to transactions with decedent, see WITNESSES, 1.
To impeach witness, see WITNESSES, 6-8.

1. EVIDENCE (2)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE. The courts will take judicial notice that most religious corporations are charitable. *In re Foss' Estate*..... 681

2. EVIDENCE (50)—RELEVANCY—MATTERS EXPLANATORY OF FACTS IN EVIDENCE. It is competent for a witness, in repeating a conversation concerning the transaction in dispute, to state that, as reasons for not advancing certain money, he said he had a wife and six children to support. *Bayers v. Barry*..... 252

3. EVIDENCE (153)—PAROL EVIDENCE—RECEIPTS. Where a check was issued and accepted, reciting that it was "full settlement" of all expenses and services, it is competent to show that it was accepted on account only, under an oral agreement to make a complete settlement later. *LeDoux v. Seattle North Pacific Shipbuilding Co.* 632

Evidence—Continued.

4. EVIDENCE (175)—PAROL TO EXPLAIN WRITING. Where a telegram between the parties is perfectly plain and unambiguous, it is not competent for the sender to explain what he meant by the telegram. *Bayers v. Barry* 252

5. EVIDENCE (184) — OPINION EVIDENCE — CONCLUSIONS. The testimony of a passenger in an automobile that there was not sufficient room to pass to the right of an approaching automobile, is not objectionable as calling for the conclusion of the witness. *Shelley v. Norman* 381

Examination:

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 3, 4.

Excessive Assessment:

For public improvement, see MUNICIPAL CORPORATIONS, 7, 8.

Excessive Damages:

See DAMAGES, 6-8.

Exchange of Property:

See VENDOR AND PURCHASER, 1-3, 9, 10.
Specific performance of contract for, see SPECIFIC PERFORMANCE.

Exclusion:

Of negro from seat in theater, see THEATERS AND SHOWS; TORTS.

Execution:

Effect of stay of proceedings on appeal from order appointing receiver, see APPEAL AND ERROR, 6.
Effect of appointment of receiver, see RECEIVERS.

1. EXECUTION — SALE — EFFECT OF REVERSAL OF JUDGMENT. After reversal of a judgment under which there had been an execution sale of a house, the owner cannot recover, as rents and profits, the real estate agent's reasonable commission for collecting the rent. *Dart v. McDonald* 448

Executors and Administrators:

Settlement of partnership estates, see PARTNERSHIP, 3.
Administration of trust estate, see WILLS, 2.

1. EXECUTORS AND ADMINISTRATORS (13)—QUALIFICATIONS OF ADMINISTRATOR—RESIDENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the residential qualification of a surviving partner to administer on partnership property where it is shown that, upon re-

Executors and Administrators—Continued.

ceipt of advice of the death of the deceased, the surviving partner immediately left Alaska for Seattle, shipped his household goods to Seattle and intended to make Seattle his home. *Simon v. Levy* 556

2. EXECUTORS AND ADMINISTRATORS (59)—ALLOWANCE TO SURVIVING SPOUSE—PETITION—SUFFICIENCY. In a petition to set aside property to a widow in lieu of a homestead, an allegation that no declaration of homestead had ever been filed, is a sufficient compliance with Laws 1917, p. 670, § 103, requiring that "no homestead has been claimed in the manner provided by law." *In re Johnson's Estate* 61

3. SAME (60)—ALLOWANCE TO SURVIVING SPOUSE—NONRESIDENTS. A nonresident widow is entitled to the allowance of $3,000, under Laws 1917, pp. 670, 671, §§ 103, 104, providing that the home, household goods and property not exceeding $3,000 shall be set aside to the widow; since the law is not strictly a homestead or exemption law, but is based on charity to prevent dependency and is to be liberally construed; the widow being in no sense a contending party as to creditors. *In re Johnson's Estate*..... 61

4. SAME (62)—ALLOWANCE BY COURT—DETERMINATION OF VALUE—EVIDENCE—SUFFICIENCY. The value of property set aside to a widow in lieu of a homestead is sufficiently shown where there was no evidence to contradict the value as testified to by the defendant. *In re Johnson's Estate*..... 61

5. SAME (64)—IMPROPER OR EXCESSIVE ALLOWANCE. An allowance to a widow in lieu of a homestead will not be set aside and a new trial granted because the property was of greater value than found by the court, where the parties appeared in answer to the petition, and offered no evidence to show value, and made no objection to the testimony offered. *In re Johnson's Estate*..... 61

6. EXECUTORS AND ADMINISTRATORS (120, 133)—SALES UNDER ORDER OF COURT—NOTICE—SUFFICIENCY—VACATION OF SALE. An executor's sale of real estate at prices below the present appraised value will be set aside at the instance of interested parties, where notices of sale contained imperfect descriptions of the property and no title of the cause, and some of the notices were unsigned and did not mention the date or place of sale and were not published more than ten days; in view of Laws of 1917, p. 678, § 127, prescribing the requisites for the notice and publication for three successive weeks. *In re Abrams' Estate*..... 51

7. EXECUTORS AND ADMINISTRATORS (3, 156) — SALES — POWERS AND JURISDICTION OF COURT UNDER NONINTERVENTION WILL. The probate court has authority to order a sale of real estate upon public notice, upon application of the executor of a nonintervention will, in view of Laws of 1917, p. 684, § 146, providing that an executor of a nonintervention will *may* sell property without order of court if author-

Executors and Administrators—Continued.

ity is given in the will, and p. 706, § 219, declaring the intention to authorize the courts in probate to settle estates, and § 220, providing that, in exercising the jurisdiction and powers granted, the court may give such notice as may be considered proper or necessary. *In re Abrams' Estate*..... 51

Exemptions:

From inheritance tax, see TAXATION.

Expert Testimony:

In civil actions, see EVIDENCE, 5.

Examination of experts, see WITNESSES, 3, 4.

False Pretenses:

Obtaining goods or money by false pretenses as larceny, see LARCENY, 1.

Purchasers of goods obtained by false pretenses, see SALES, 4.

False Representations:

See FRAUD.

Fees:

Attorney, see ATTORNEY AND CLIENT.

Attorney's fees in action by stockholder on behalf of corporation, see CORPORATIONS, 5.

Of attorney as element of damages, see DAMAGES, 4.

Filing:

Proof of service of notice of appeal, see APPEAL AND ERROR, 5.

Findings:

Review on appeal or writ or error, see APPEAL AND ERROR, 8.

Review of findings of public service commission in fixing gas rates, see GAS.

Fish:

Fishing crew as seamen, see SEAMEN.

Floods:

Measure of damages for flooding land, see DAMAGES, 5.

Injuries from flooding lands, see WATERS AND WATER COURSES, 1, 3-5.

Flowage:

Injuries by flowage of water, see WATERS AND WATER COURSES, 1, 3-5.

Forcible Entry and Detainer:

1. FORCIBLE ENTRY AND DETAINER (5)—PROCESS—TIME FOR SERVICE. The service of summons in forcible entry and detainer prior to the filing of the complaint is sufficient. *Boyd v. North*..... 540

2. SAME (5). Rem. Code, §§ 221 and 222 prescribing the requirements of a summons for the commencement of general actions does not apply to actions of forcible entry and detainer. *Boyd v. North* 540

Foreign Judgments:

Persons concluded by judgment, see JUDGMENT, 7.

Forfeiture:

Of lease for breach of covenant, see LANDLORD AND TENANT, 2.
Waiver of by acceptance of rent, see LANDLORD AND TENANT, 9.
Of mining lease, see MINES AND MINERALS.

Forgery:

1. FORGERY (4) — INDICTMENT AND INFORMATION (73) — DUPLICITY—SERIES OF ACTS. An information for forgery is not duplicitous where the acts charged were of a series constituting one crime. *State v. McDonald* 696

Former Adjudication:

As bar to action, see JUDGMENT, 5-7.

Fraud:

In inception of note, see BILLS AND NOTES, 4.
As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, 1
Validity of assent to contracts, see CONTRACTS, 3.
Corporate officers, see CORPORATIONS, 6.
Avoiding contract of sale of land, see VENDOR AND PURCHASER, 5, 9.

1. FRAUD (3)—FRAUDULENT REPRESENTATIONS IN GENERAL—NATURE—ADOPTION OF STATEMENTS. Where the seller of a moving picture business referred to conditions represented to him by his vendor as to the business at a time when his vendee was present and negotiating for the business, he adopted the representations and made them his own, and must answer therefor if he knew them to be false, since his conduct amounted to a concealment or suppression of the truth. *Jammie v. Robinson*..... 275

2. SAME (6) — RELIANCE ON REPRESENTATIONS AND INDUCEMENT TO ACT. Damages for fraud in misrepresenting the usefulness of a patent cannot be recovered where plaintiff did not rely thereon, but being a practical mechanic, made his own tests and assisted in demonstrating. *Robeson v. G. G. No-Skid'm Tire Belt Co*..... 98

Fraud—Continued.

3. FRAUD (22)—ACTIONS—EVIDENCE—SUFFICIENCY. Fraud in misrepresenting a patent as a basic patent is not proven where it was shown that all the papers represented it only as a "new and useful improvement" of an older device. *Robeson v. G. G. No-Skid'm Tire Belt Co.* 98

4. FRAUD (22)—EVIDENCE—SUFFICIENCY. Upon an issue as to fraud in the sale of a moving picture business, there is a question for the jury where the seller represented that the theater was clearing $250 to $300 per month, and he admitted on the stand that it lost about $3.50 per day. *Jammie v. Robinson*..... 275

5. SAME (23)—DAMAGES—MEASURE. In an action to recover money paid for a moving picture business under false representations, the measure of damages is not the difference between the actual value and the value as represented; but the buyer, having tendered the theater back, may recover the money paid under the contract vitiated by fraud, and this includes a deposit for rent of the premises. *Jammie v. Robinson*..... 275

Frauds, Statute of:

1. FRAUDS, STATUTE OF (25, 26)—SALE OF GOODS—ACCEPTANCE—DELIVERY. Rem. Code, § 5290, requiring a written memorandum of a sale of goods for $50 or over, unless the purchaser shall accept and receive part of the goods, or make a payment, does not require that the acceptance and delivery be contemporaneous with the making of the contract; but the statute is satisfied where the seller of logs authorizes the buyer to take possession after they are scaled, which was done. *Hosner v. McDonnell*..... 489

2. FRAUDS, STATUTE OF (25, 26)—SALE OF GOODS—ACCEPTANCE. There is a sufficient acceptance of logs sold to answer the statute of frauds where the seller had inspected them, agreed to pay for them as soon as scaled at a given price per thousand, and when scaled sent a tug for them and took possession as authorized to do. *Hosner v. McDonnell* 489

3. FRAUDS, STATUTE OF (58)—ORAL EVIDENCE—IDENTIFYING CONTRACT REFERRED TO. A written contract is not within the statute of frauds because of the necessity to resort to oral testimony for the purpose of identifying contracts had on the land and referred to, and not to establish any of its essential terms. *Le Marinel v. Bach*..... 651

Fraudulent Conveyances:

1. FRAUDULENT CONVEYANCES (21)—INTENT TO DEFRAUD CREDITORS. A conveyance by a husband for the use of his children, pending an action for a divorce, is fraudulent as to the wife, where the purpose was to prevent her from receiving any share of the property. *Goulette v. Goulette*..... 689

Fraudulent Conveyances—Continued.

2. FRAUDULENT CONVEYANCES (92, 97)—PREFERENCE OF RELATIVES—PAYMENT OF DEBT—EVIDENCE—SUFFICIENCY. A preference of a brother-in-law by the transfer of notes in payment of an outlawed debt, is not shown to be fraudulent as to a judgment creditor, who had instituted garnishment to impound the notes, where it is undisputed that the notes were sent and received in payment of the debt, and the assignee had no knowledge of the judgment or garnishment proceedings. *Guaranty Security Co. v. Coad*..... 156

Freedom of Speech:

Constitutional guaranties, see CONSTITUTIONAL LAW, 4.

Game:

1. GAME—CRIMINAL PROSECUTION—VIOLATION OF GAME LAWS—JUSTIFICATION—PROTECTION OF PROPERTY. In a prosecution for violation of the game law making it a criminal offense to kill elk, it is a complete defense to show that the killing was reasonably necessary to prevent the destruction of the accused's property. *State v. Burk* 370

2. SAME—EVIDENCE OF JUSTIFICATION—SUFFICIENCY. In a prosecution for unlawfully killing elk, in violation of the game law, a reasonable necessity for the killing is shown by evidence to the effect that a band of elk were in the habit of trespassing upon accused's property, destroying crops, doing material damage, and on one occasion had killed a valuable calf, that they had been repeatedly driven off but returned and were running through and trampling crops at the time two of them were shot by accused. *State v. Burk*..... 370

3. SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for killing elk in violation of the game laws, upon an issue as to the necessity of the killing in defense of property, accused may show recent past injury by the elk in question, and the extent of the damage done or threatened. *State v. Burk*..... 370

Garnishment:

Consolidation of actions, see ACTION.

Lien of as affecting *bona fides* on transfer of note, see BILLS AND NOTES, 2.

Gas:

1. GAS (3)—CHARGES—PUBLIC SERVICE COMMISSION—FINDINGS—REVIEW. The findings of the public service commission in fixing gas rates will not be disturbed by the courts in the absence of a showing of capriciousness or arbitrary action; and none appears from the fact that statistics and tabulations from the company's books were used, where the report of the accounting department of the commis-

Gas—Continued.

sion showed substantially the same condition. *State ex rel. Seattle v. Public Service Commission*..... 646

2. SAME. Findings of the public service commission as to the reasonableness of rates will not be disturbed because of a consideration of reports made and comparative figures and statements, not regularly introduced in evidence, where the finding was not based thereon and was supported by other substantial evidence. *State ex rel. Seattle v. Public Service Commission*..... 646

General Laws:

Necessity of pleading, see STATUTES, 4.

Good Faith:

Of purchaser, see BILLS AND NOTES, 3.

Governmental Functions:

Liability of county for damages in performance of, see COUNTIES, 2.

Guardian Ad Litem:

In action by or against infants, see INFANTS, 2.

Guardian and Ward:

Guardian ad litem, see INFANTS, 2.

1. GUARDIAN AND WARD (7)—CUSTODY AND CARE OF PROPERTY—CONTRACTS—SERVICES. A general guardian for infants has no authority to encumber the ward's estate without authority of the court, or make a contract with an attorney for an interest in real property recovered by suit. *Wilson v. Van Horn*..... 109

Habeas Corpus:

To obtain custody of child, see PARENT AND CHILD.

1. HABEAS CORPUS (5, 6)—NATURE AND GROUNDS OF REMEDY—PROCEEDINGS REVIEWABLE — COMMITMENT FOR CONTEMPT — VALIDITY. An order committing petitioner to the custody of the sheriff until such time as he shall comply with the order of court requiring the payment of alimony, is in effect a commitment, and if valid on its face, the petitioner cannot be discharged from custody on a writ of habeas corpus. *In re Bishop*..... 245

Habitual Criminals:

See CRIMINAL LAW, 26.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 9-11.
In criminal prosecutions, see CRIMINAL LAW, 22-25.

Highways:

Crossing railroad line, see RAILROADS, 1.
Accidents at railroad crossings, see RAILROADS, 2, 3.

1. HIGHWAYS (58) — NEGLIGENT USE—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE. Whether plaintiff was guilty of contributory negligence in turning to the left to avoid an automobile collision, is a question for the jury, where there was testimony to the effect that it was done in an emergency to avoid a head-on collision with a car driven on the wrong side of the road wrongfully attempting to pass another car when there was not sufficient room or time to do so. *Shelley v. Norman*..... 381

2. SAME (59)—NEGLIGENT USE—ACTIONS—INSTRUCTIONS. Where a highway had two travelled tracks, it is proper to instruct to the effect that the right of the center of a highway to one using one of the travelled tracks would mean the right of the center of the track being used. *Shelley v. Norman*..... 381

3. SAME (59). An instruction is proper where it is stated that one turning to the left in meeting another car is guilty of contributory negligence unless he had reasonable ground to believe that it was his duty to do so to avoid a collision and a reasonably prudent man would have honestly believed that the collision was imminent if he turned to the right. *Shelley v. Norman*..... 381

History:

Of passage of statutes as aid to construction, see STATUTES, 3.

Humiliation:

As ground for compensatory damages, see DAMAGES, 1.

Husband and Wife:

Parties entitled to costs, see COSTS.
Descent of community property, see DESCENT AND DISTRIBUTION.
Divorce and judicial separation, see DIVORCE.
Conveyances fraudulent as to wife seeking divorce, see FRAUDULENT CONVEYANCES, 1.
Surviving husband as tenant in common, see TENANCY IN COMMON.

1. HUSBAND AND WIFE (18, 20)—SEPARATE ESTATE—CONVEYANCES TO WIFE—PROCEEDS OF SEPARATE PROPERTY. Land conveyed by husband to wife is, as between them, her separate property, where they had purchased it with other property subject to mortgage, she agreed to pay a specified part of the mortgage, used her portion as her separate property and mortgaged it, using the proceeds to pay her assumed part of the prior mortgage. *Dart v. McDonald*..... 448

2. SAME (58) — COMMUNITY PROPERTY — EVIDENCE AS TO CHARACTER. The husband's joining in a deed of the wife's separate property does not show that it was community property. *Dart v. McDonald*... 448

Husband and Wife—Continued.

3. HUSBAND AND WIFE (69, 70) — COMMUNITY PROPERTY — LEASES — ESTOPPEL TO ASSERT INVALIDITY. A wife is not estopped to contest the husband's extension of a lease of community property, made without her knowledge or consent, from the mere fact that she had always been satisfied to have her husband handle community affairs including the leasing of community real estate; in view of Rem. Code, § 5918, prohibiting the husband's conveyance thereof unless the wife join in executing the instrument. *Kaufman v. Perkins*. 40

4. SAME. The voluntary installation of coal burners, which were removed, and other expenditures required by the lease to be made by a lessee holding over under an authorized extension of a lease, do not constitute a part performance which would estop the wife from asserting the invalidity of the extension. *Kaufman v. Perkins* 40

5. HUSBAND AND WIFE (84)—COMMUNITY PROPERTY—DEBTS INCURRED BY HUSBAND—TORTS—OFFICIAL DELINQUENCIES. The tort of a county clerk in obtaining an unlawful preference by withdrawing from an insolvent bank a deposit of public funds, is not a community debt, and the community cannot be held therefor. *Kies v. Wilkinson*. 89

6. HUSBAND AND WIFE (90, 95) — COMMUNITY PROPERTY — ACTIONS — INTERVENTION BY WIFE—ENFORCEMENT OF FOREIGN JUDGMENT. In an action upon a foreign judgment recovered against a husband alone, it may be shown by proper proceedings that it is or is not for a community debt. *Crowley v. Baumgartner*..... 193

Hypothetical Questions:

In examination of expert witnesses, see WITNESSES, 3, 4.

Identity:

Of stolen cattle, see LARCENY, 2.
Of gun used by accused, see ROBBERY.

Impeachment:

Of verdict by testimony or affidavit of jurors, see CRIMINAL LAW, 12.
Of witnesses, see WITNESSES, 6-8.

Implied Repeal:

Of statutes, see STATUTES, 2.

Imprisonment:

Inquiry into legality of, see HABEAS CORPUS.

Improvements:

Liens for, see AGRICULTURE.
Public improvements, see MUNICIPAL CORPORATIONS, 3-8.
As giving peferential right to purchase tide or shore lands, see PUBLIC LANDS.

Indemnity:

Contractor's bonds on public work, see MUNICIPAL CORPORATIONS, 3, 4.

Indemnity Insurance:

See INSURANCE.

Indictment and Information:

See FORGERY.
Harmless error in rulings on, see CRIMINAL LAW, 22.

1. INDICTMENT AND INFORMATION (34, 60)—INSURRECTION—CERTAINTY. An information charging criminal syndicalism substantially in the language of the statute, is not indefinite and uncertain, where it alleges the time and place, the connection of the accused with the Industrial Workers of the World and the purpose of that organization. *State v. Hennessy*..... 351

2. INDICTMENT AND INFORMATION (52) — KIDNAPING — ELEMENTS OF OFFENSE — DESIGNATION OF PARENT OR CUSTODIAN. An information under Rem. Code, § 2410, charging the kidnaping of a child of tender years, naming it, by taking and detaining her with intent to conceal her from her parents or other persons having lawful care and control of her, is not defective in failing to name the persons from whom she was taken; since it is the identity of the child and not of the custodians that is material and has to do with the elements of the offense. *State v. Hoyle*..... 290

3. INDICTMENT AND INFORMATION (74) — SEDUCTION (10) — DUPLICITY — SEVERAL MEANS. An information for seduction is not duplicitous in charging persuasion, promise of marriage and other fraudulent means in accomplishing the seduction; nor is it insufficient in its statement of facts. *State v. Parker*..... 428

4. INDICTMENT AND INFORMATION (77) — DUPLICITY — CRIMINAL SYNDICALISM — OFFENSES. Laws of 1919, p. 518, § 1, defines criminal syndicalism as a single offense of effecting or resisting any industrial, economic, social or political change in any of the different ways or means specified, which are not repugnant to one another, and does not define separate and distinct offenses arising out of disconnected transactions; hence an information substantially in the language of two subdivisions of the act charges but one offense and is not duplicitous. *State v. Hennessy*..... 351

Industrial Insurance:

See MASTER AND SERVANT, 2.

Infants:

See GUARDIAN AND WARD.
Custody and support on divorce of parents, see DIVORCE, 2.
Dangerous premises as attractions to children, see NEGLIGENCE, 2, 3.
Custody of, competency of parent, see PARENT AND CHILD.

Infants—Continued.

1. INFANTS (14)—CONTRACTS—REPUDIATION—ESTOPPEL. Under Rem. Code, § 5294, providing that a minor cannot disaffirm his contracts where on account of his own misrepresentations or having engaged in business, the other party has good reason to believe him capable of contracting, a minor is estopped from denying liability where he had accumulated $800, made his own contracts, collected his own wages and did his own banking, and the other party had no reason to believe that he was a minor. *Gill v. Parry*..... 19

2. INFANTS (21)—ACTIONS—GUARDIAN AD LITEM—POWERS. A guardian *ad litem* to prosecute a suit for minors may employ counsel but has no authority to contract as to the amount of compensation, which must be fixed by the court. *Wilson v. Van Horn*..... 109

Information:

Criminal accusation, see INDICTMENT AND INFORMATION.

Inheritance Tax:

See TAXATION.

Injunction:

Violation of order as contempt, see CONTEMPT.

To protect rights of abutting owner of shore lands, see PUBLIC LANDS, 3.

Insolvency:

Revival of debt discharged, see BANKRUPTCY.

Preference as fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.

Payment of debt by failing debtor, see LIMITATION OF ACTIONS, 2.

Instructions:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 3 4.

In criminal prosecutions, see CRIMINAL LAW, 10, 11.

In civil actions, see TRIAL, 3-6.

Insurance:

1. INSURANCE (122)—LIABILITY FOR PERSONAL INJURIES OR DAMAGES INCURRED—INDEMNITY OR LIABILITY BOND. The bond of a compensated surety company was intended as a "liability" but not as an "indemnity" bond, where the bond was headed "liability bond" and was applied for as such, as provided by Rem. Code, § 5562-37, and the surety agreed to indemnify against loss from liability imposed by law upon the insured for damages "to any person" other than insured and their employees, and agreed to contest and defend any suits brought on the liability, and the bond contained no clause or any special conditions to the effect that no action shall lie thereon until the loss or expense shall have been sustained or paid. *Fenton v. Poston* 217

Insurance—Continued.

2. SAME (122)—RISKS AND CAUSES OF LOSS—LAPSE OF POLICY—RELEASE. Where the premium in a liability bond was paid in advance at the time that a liability arose, the surety is liable although the liability was not established until after lapse of the policy, which expressly provided for a release only when the company is released from and has incurred no liability under the bond. *Fenton v. Poston* 217

Insurrection:

Sufficiency of information charging criminal syndicalism, see INDICTMENT AND INFORMATION, 1, 4.

1. INSURRECTION — ELEMENTS OF OFFENSE — INTENT. Knowledge or intent is not an element of the offense of criminal syndicalism, Laws 1919, p. 518, § 1, and one voluntarily becoming a member of a group of persons prohibited by statute and doing this act is guilty whether he intended to violate the law or not. *State v. Hennessy* 351

Intent:

Felonious intent on entry, see BURGLARY.
Element of fraud as to creditors, see FRAUDULENT CONVEYANCES, 1.
As element of crime, see INSURRECTION.
Transfer of title on sale of goods, see SALES, 3.
Of legislature as element in construction of statutes, see STATUTES, 3.

Interest:

In partnership, presumptions as to, see PARTNERSHIP, 1.

1. INTEREST (7) — DEMANDS NOT LIQUIDATED. A demand against a county clerk for wrongfully withdrawing a deposit from an insolvent bank, draws interest from the date of withdrawal, where the sum wrongfully obtained was a specific amount which may be lessened by facts then existing and capable of ascertainment. *Kies v. Wilkinson* 89

Interstate Commerce:

Employees engaged in, see MASTER AND SERVANT, 4.

Intervention:

By wife to show nature of debt, on enforcement of foreign judgment, see HUSBAND AND WIFE, 6.

Intoxicating Liquors:

1. INTOXICATING LIQUORS (30) — OFFENSES — ILLEGAL POSSESSION — ELEMENTS OF OFFENSE. One who partakes of a friend's hospitality by accepting and drinking a glass of liquor is not guilty of "illegal possession," in view of Laws 1917, p. 61, § 12, providing that a layman's possession of intoxicating liquor other than alcohol shall be

Intoxicating Liquors—Continued.

prima facie evidence that the liquor was kept for the purpose of unlawful sale or disposition, and Id., p. 60, § 11, making such possession unlawful and defining "jointist" and "bootlegger," it being the intention that "possession" should be of such quantities or under such conditions as would make it available for unlawful transportation or sale. *State v. Jones*..... 144

Irrigation:

Condemnation for irrigation ditch, see EMINENT DOMAIN, 1.
Injury from construction of ditch, see WATERS AND WATER COURSES, 3.

Joint Adventures:

See PARTNERSHIP.

Joint Tenancy:

See TENANCY IN COMMON.

Judges:

Change of, see VENUE.

Judgment:

Review in general, see APPEAL AND ERROR.
Compliance with as cessation of controversy on appeal, see APPEAL AND ERROR, 1.
For attorney's fees, see ATTORNEY AND CLIENT, 3.
In suit by stockholder on behalf of corporation, see CORPORATIONS, 4.
Modification of decree respecting custody of children, see DIVORCE, 2.
Of execution, effect of reversal, see EXECUTION.
Against husband alone, as for separate or community debt, see HUSBAND AND WIFE, 6.
Against tenant for unlawful detainer, see LANDLORD AND TENANT, 15-17.
In action to rescind contract for sale of land, see VENDOR AND PURCHASER, 6.

1. JUDGMENT (59) — ON TRIAL OF ISSUES — PARTIES. It is error to grant a judgment notwithstanding a verdict, in favor of only one party, leaving the case undetermined as to the other parties. *Buckley v. Harkens*..... 468

2. SAME (70) — ENTRY — TIME OF ENTRY BY CLERK. Under Rem. Code, § 431, providing for entry of judgment by the clerk immediately on return of the verdict, the clerk's powers are confined to that time, and the court may withhold the entry, in which case the clerk can only enter a judgment by direction of the court. *Buckley v. Harkens*..... 468

3. SAME (81, 84, 85) — ENTRY — CONFLICT IN RECORD—CORRECTION—POWERS OF COURT — JUDGMENTS THAT MAY BE CORRECTED. A memo-

Judgment—Continued.

randum decision, after withholding entry of judgment by the clerk upon a verdict, to the effect that the court had concluded to let the judgment stand, is not a judgment; and the court may treat the clerk's unauthorized entry of judgment thereon as a nullity, and on a "rehearing" of the matter, may enter a valid judgment in favor of the other party notwithstanding the verdict, without first setting aside the invalid entry. *Buckley v. Harkens*..... 468

4. JUDGMENTS (84)—CORRECTION IN SAME COURT—AUTHORITY. The court cannot on motion enter a second judgment while there is a valid subsisting judgment which can be vacated or modified only for the causes and in the manner specified. *Buckley v. Harkens*.... 468

5. JUDGMENT (189) — CONCLUSIVENESS — JUDGMENT ON DEMURRER. Where the sole purpose of an action was to test the validity of an ordinance, and a demurrer to the complaint was sustained for the reason that the major portion of the ordinance was valid, the judgment dismissing the action did not involve any question as to a violation of the ordinance. *White v. Turner*..... 405

6. JUDGMENT (204-1)—CONCLUSIVENESS — PERSONS CONCLUDED—TRUSTEE AND CESTUI QUE TRUST. A judgment of dismissal, with prejudice, of an action by a trustee in bankruptcy to recover unpaid stock subscriptions due the insolvent corporation, upon a settlement of the liability, is a bar to another action by creditors to recover on the same stock subscriptions. *DeMuth v. Kleeb*..... 607

7. JUDGMENT (258) — FOREIGN JUDGMENTS — CONCLUSIVENESS — PERSONS BOUND — WIFE OF DEFENDANT. In an action upon a foreign judgment recovered against a husband alone, the wife may not intervene and set up defenses to the merits, as that was foreclosed in the courts of the sister state, under the full faith and credit clause of the constitution. *Crowley v. Baumgartner*..... 193

Judicial Sales:

On execution, see EXECUTION.
Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 6, 7.

Jurisdiction:

Criminal prosecutions, see CRIMINAL LAW, 2.
Disposition of property on divorce, see DIVORCE, 1.
Of court under non-intervention will, see EXECUTORS AND ADMINISTRATORS, 7.

Jury:

Instructions in criminal prosecutions, see CRIMINAL LAW, 10, 11.
Misconduct of juror as ground for new trial, see CRIMINAL LAW, 12-14.
Instructions in civil actions, see TRIAL, 3-6.

Jury—Continued.

1. JURY (44) — COMPETENCY—PRIOR SERVICE—SAME OR SIMILAR CASE. Under Rem. Code, § 330, disqualifying one who had served as a juror in a criminal action by the state against either party upon substantially the same facts, a juror is not disqualified in a prosecution for forgery of an indorsement on an instrument by previously sitting at the trial of defendant's sister charged with forgery of another indorsement upon the same instrument, since defendant was not a party to the former action. *State v. McDonald*..... 696

2. JURY (62) — SELECTION — OBJECTIONS AND EXCEPTIONS. Error in denying a challenge to a juror cannot be assigned where it does not appear that he was not subsequently removed by a peremptory challenge, or that accused exhausted all his challenges. *State v. Muller* 660

Justices of the Peace:

Certiorari to review decision of justice court, see CRIMINAL LAW, 20.

Justification:

For wrongful killing of elk, see GAME.

Kidnaping:

Necessity of designating parent or custodian, see INDICTMENT AND INFORMATION, 2.

Knowledge:

Defenses to bills or notes, see BILLS AND NOTES, 1-4.

Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 7.

Consciousness of female as element of offense, see RAPE.

Landlord and Tenant:

Estoppel of wife to contest husband's lease of community property, see HUSBAND AND WIFE, 3, 4.

Mining lease, see MINES AND MINERALS.

1. LANDLORD AND TENANT (15) — LEASE — CONDITIONS — STIPULATION AGAINST "TRANSFER." A lease providing that the same shall not be "transferred" without the written consent of the lessor cannot be "assigned" without such consent. *Gazzam v. Young*..... 66

2. SAME (24, 28, 39-2) — TERM FOR YEARS—ASSIGNMENT AND SUBLETTING — COVENANTS AND CONDITIONS — BREACH. A lease for a term of years containing a covenant not to assign or sublet without the consent of lessor entitles the lessor to a forfeiture regardless of whether the lease expressly provided for a forfeiture on breach of such covenant, where the evidence shows that the lessees had assigned the lease. *Boyd v. North*..... 540

Landlord and Tenant—Continued.

3. LANDLORD AND TENANT (27) — DISTINCTION BETWEEN ASSIGNMENT AND SUBLEASE. An instrument in the form of lease executed by a lessee and subletting the premises for the full term in the exact terms of the original lease, operates as an assignment. *Gazzam v. Young* 66

4. SAME (31) — RENEWALS — OPTION TO RENEW. The right to a renewal of a lease is a substantial right and part of the term itself, and is independent of the payment of rent when rent is not expressly declared to be a condition precedent to the exercise of the privilege. *Henry v. Bruhn & Henry*..... 180

5. LANDLORD AND TENANT (31)—LEASE — OPTION FOR RENEWAL — NOTICE — CONTINUING POSSESSION. Where a lease gave the right to a renewal or an extension without providing for the giving of any notice to the lessor, the lessee is entitled to the benefit of an extension or renewal by continuing in possession at the end of the original term, without giving formal notice of intention to exercise the option, provided such possession is indicative of an exercise of the option and nothing is done to forfeit his rights. *Salzer v. Manfredi*..... 666

6. SAME (31). Where a lease gave a single option for renewal for from one to five years, as the lessee might elect, and he exercised the option merely by holding over without electing as to the term, the law will presume that he elected a renewal for the shortest term specified, or one year. *Salzer v. Manfredi*..... 666

7. LANDLORD AND TENANT (114, 115)—RENT—ACTIONS—VALUE OF GROUND RENT—EVIDENCE. In an action to recover ground rent, based upon five per cent of value appraisements to be made every five years, similar transactions in the vicinity are properly considered but are not conclusive criterions of value, especially where the relations of the parties made it not unreasonable to allow the sellers something over the actual value; nor is a prospectus of the "Somers System of Valuation" to be considered when it was not put in evidence. *Thomas v. Citizens' Realty Co*..... 456

8. SAME. In such a case, a valuation of $119,115.18 is shown, where the preponderance of the evidence was that the corner influence amounted to fifty per cent, instead of one-third as found by the court, and computed on that basis the above sum would be reached. *Thomas v. Citizens' Realty Co*..... 456

9. SAME (124) — ACTION TO RECOVER POSSESSION—DEFENSES—WAIVER OF FORFEITURE. Where the lessor had uniformly acquiesced in the payment of rent after the due dates, he cannot declare a forfeiture for nonpayment of rent in advance and resist an optional renewal of the lease which the tenant elected to renew prior to the expiration of the term or the commencement of an action to forfeit the lease. *Henry v. Bruhn & Henry*..... 180

Landlord and Tenant—Continued.

10. SAME (126, 139) — UNLAWFUL DETAINER — EXISTENCE OF CONVENTIONAL RELATION—PARTIES BY AND AGAINST WHOM ACTION LIES. An assignment of the lease without the knowledge or consent of the landlord, leaves the original lessee as his tenant; and the landlord may maintain unlawful detainer against the tenant and the subtenants. *Gazzam v. Young* 66

11. LANDLORD AND TENANT (127) — RECOVERY OF POSSESSION — UNLAWFUL DETAINER — RIGHT TO MAINTAIN. The lessor is entitled to recover possession in an unlawful detainer action, under Rem. Code, § 812, subd. 4, and the express provisions of § 827, upon the lessee's violation of a covenant not to assign or sublet, without regard to the form of the assignment. *Boyd v. North* 540

12. LANDLORD AND TENANT (144)—ACTIONS FOR UNLAWFUL DETAINER—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether defendant, in unlawful detainer, had a right to an extension of the lease, a reply to the effect that defendant's option for an extension had been forfeited by failure to pay rent in advance, may be met by the defendant by proof that plaintiff had waived payment of rent in advance. *Henry v. Bruhn & Henry* 180

13. SAME (144)—TERM FOR YEARS—UNLAWFUL DETAINER—ASSIGNMENT—EVIDENCE—ADMISSIBILITY. In an action of unlawful detainer, on breach of a condition not to assign the lease, the testimony of a witness that she accounted to the assignee for receipts of the operation of the premises is admissible to show the assignment. *Boyd v. North* 540

14. SAME (145)—UNLAWFUL DETAINER—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the assignment of a lease in violation of a covenant not to do so without the written consent of the lessor, where it is shown that a witness had accounted to the person to whom it was alleged the lessees had assigned the lease for the receipts from the operation of the apartment building. *Boyd v. North* 540

15. LANDLORD AND TENANT (146) — UNLAWFUL DETAINER — DAMAGES AND AMOUNT OF RECOVERY. In an action for unlawful detainer, it is error to include in the judgment for damages, rent for a period of two months during which the defendants were rightfully in possession and for which they had paid the rent. *Lochridge v. Natsuhara* 326

16. SAME (146). In an action for unlawful detainer, it is error to include damages for withholding the premises after the trial of the case until entry of judgment, where there was nothing to show that possession was withheld after the trial. *Lochridge v. Natsuhara* 326

Landlord and Tenant—Continued.

17. LANDLORD AND TENANT (147)—UNLAWFUL DETAINER—DOUBLE DAMAGES. In unlawful detainer against a lessee and against subtenants to whom the lease had been assigned without the written consent of the lessor, damages in twice the amount of damages assessed and overdue rent must be awarded against the original lessee as well as against the subtenants. *Gazzam v. Young*..... 66

18. SAME (148) — TRIAL — INSTRUCTIONS. Under the statute, Rem. Code, § 827, intending unlawful detainer as a remedy for breach of a condition against assignment and subletting without the landlord's consent, it is proper to give instructions permitting the jury to find such assignment and subletting without direct evidence on the matters. *Boyd v. North*..... 540

Lands:

State lands, see PUBLIC LANDS.

Lapse:

Of insurance policy as affecting liability, see INSURANCE, 2.

Larceny:

New trial for misconduct of juror, see CRIMINAL LAW, 12-14.

1. LARCENY (1)—STATUTORY PROVISIONS—DISTINGUISHED FROM FALSE PRETENSES. Rem. Code, § 2129, providing that all property obtained by "larceny . . ." shall be restored to the owner and no sale shall divest the owner of his rights, has reference to "larceny" as defined by that act (Laws 1854, p. 83 *et seq.*, §§ 45, 46, 55), which did not include obtaining money by false pretenses, which was a distinct offense under Id., §54, although larceny as now defined includes that offense; hence property obtained by false pretenses does not fall within the protection of § 2129, and may pass to *bona fide* purchasers from the wrongdoers. *Linn v. Reid*..... 609

2. LARCENY (28) — EVIDENCE — WEIGHT AND SUFFICIENCY — IDENTITY. In a prosecution for larceny, the identification of decomposed heads of young cattle raises a question for the jury, where the cattle were pets with peculiar shaped heads and horns with marks thereon familiar to two witnesses recognizing them. *State v. McChesney* 208

Law of the Road:

Contributory negligence in turning to left to avoid collision, see HIGHWAYS.

Lawyer:

See ATTORNEY AND CLIENT.

Leases:

See LANDLORD AND TENANT.
Forfeiture of mining lease, see MINES AND MINERALS.

Legacies:

Taxation of legacies, see TAXATION.

Legislature:

Intent as element in construction of laws, see STATUTES, 3.

Liability Bonds:

See INSURANCE.

Licensee:

Injuries to licensee, see NEGLIGENCE, 1, 4.

Licenses:

On use of motor trucks, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Liens:

Negligence of abstracter in reporting payment of assessment lien, see ABSTRACTS OF TITLE.
For labor in improving property, see AGRICULTURE.
Vendor's lien on goods sold, see SALES, 6.

1. LIENS (1)—EQUITABLE LIENS—REQUISITES. An equitable lien not created by express terms, must arise by necessary implication from the terms of the agreement construed with reference to the attendant circumstances; and none was intended, where mortgages had been foreclosed and in consideration of deeding the property back to the mortgagor and accepting new mortgages, the mortgagor agreed to have deeded to himself certain described property then held in trust for him by relatives, which he agreed to hold while indebted on the mortgages, further agreeing to apply on his indebtedness any proceeds that he might realize on the sale of the property. *American Savings Bank & Trust Co. v. Lawrence*.... 198

Limitation:

As to time of trust, see WILLS, 2.
On cross-examination of witness, see WITNESSES, 3-5.

Limitation of Actions:

1. LIMITATION OF ACTIONS (72)—ACKNOWLEDGMENT—PART PAYMENT—PERSONS BY WHOM MADE. The statute of limitations commences to run against an account from the date of the last payment thereon, even though the parties to be charged went through voluntary bankruptcy and thereafter acknowledged the debt and made a payment thereon and thereafter orally, in clear and unequivocal language, promised to pay the balance of such indebtedness. *Vachon v. Ditz* 11

Limitation of Actions—Continued.

2. LIMITATION OF ACTIONS (82)—AVAILABILITY—PERSONAL NATURE OF DEFENSE. The statute of limitations is a defense personal to the debtor, and does not prevent a voluntary payment of the debt by the transfer of promissory notes by a failing debtor. *Guaranty Security Co. v. Coad*..... 156

Liquors:

See INTOXICATING LIQUORS.

Lis Pendens:

Suspension of pending divorce, see DIVORCE, 1.

Loan of Credit:

To corporation, see CORPORATIONS, 8.

Local Prejudice:

As ground for change of venue in criminal prosecutions, see CRIMINAL LAW, 3.

Logs and Logging:

Sufficiency of acceptance and delivery of logs under statute of frauds, see FRAUDS, STATUTE OF, 1, 2.

1. LOGS AND LOGGING (55)—SALES (86, 87)—DELIVERY. A seller's authorization to a buyer of logs to take possession as soon as they are scaled, is a continuing authorization, which shows an intent to deliver the logs to him. *Hosner v. McDonnell*..... 489

2. LOGS AND LOGGING (55-58)—SALES (10, 22)—DELIVERY AND ACCEPTANCE—EVIDENCE—SUFFICIENCY. Findings that a sale of logs had been made between the parties will be sustained, where the matter depended largely on the credibility of the two parties whose testimony was conflicting, the buyer's conduct being explainable only by accepting the truth of his version that the sale was effected and that he was to send a tug for the logs as soon as they were scaled. *Hosner v. McDonnell*..... 489

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Contracts of employment by corporation, see CORPORATIONS, 7.
Seamen on vessels, see SEAMEN.

1. MASTER AND SERVANT (2)—THE RELATION—EVIDENCE OF EMPLOYMENT. The owner of land is not liable for the wages of a farm laborer employed by an independent contractor who was to reduce wild land to a state of cultivation and grow one crop thereon. *Michaud v. Burbank Co*..... 205

Master and Servant—Continued.

2. MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY — AWARD—LIMIT—STATUTES—CONSTRUCTION. Under Laws 1919, p. 355, § 4, which provides a specific schedule of awards to workmen in extra hazardous employments for certain permanent partial disabilities, followed by a general provision for compensation for any other permanent partial disability in the proportion that the same bears to the scheduled disability which it most closely resembles, "but not in any case to exceed $2,000," the $2,000 limitation does not apply to the scheduled disabilities but only to the "other" unscheduled disabilities provided for in that paragraph. *Klippert v. Industrial Insurance Department*..... 525

3. SAME (20-1)—PERMANENT PARTIAL DISABILITIES—AWARD FOR FURTHER ACCIDENT — STATUTES — CONSTRUCTION. To the extent of the scheduled awards to workmen in extra hazardous employments for certain permanent partial disabilities, Laws 1919, p. 355, § 4, the law is mandatory; and the provision in subd. g (p. 363) to the effect that, in case of a further accident to a recipient of a lump sum, his final compensation shall be adjudged with regard to the combined effect of his injuries, cannot be applied to contract or limit the award in case of another disability within the schedule. *Klippert v. Industrial Insurance Department* 525

4. MASTER AND SERVANT (20-2) — INJURIES TO SERVANT — FEDERAL LIABILITY ACT—INTERSTATE COMMERCE. A section hand, injured on the derailment of a hand car, was not engaged at the time in interstate commerce or the business of the company, where he and others had quit work for the afternoon and, contrary to the rules of the company, had left their section to obtain supplies for their boarding club, without the knowledge of the company, which furnished free transportation for all supplies needed by the men. *Adams v. Hines*..... 672

5. MASTER AND SERVANT (42, 154)—NEGLIGENCE—PLACES FOR WORK—QUESTION FOR JURY. It is for the jury to determine whether it was negligent for an employer to place an 800-lb. roll of belting on edge, unsupported so that it might fall upon a servant, and covered with burlap and a pile of paper cartons, rendering it obscure. *Ferling v. Hines* 433

6. SAME (77)—INJURIES TO SERVANTS—VICE PRINCIPALS—FOREMEN—AUTHORITY. A section foreman's order to his men to leave their section, contrary to the rules of the company, and obtain supplies for their boarding club, was not an order concerning the company's business and created no liability on the part of the company. *Adams v. Hines*..... 672

7. SAME (98, 161)—ASSUMPTION OF RISKS — KNOWLEDGE—QUESTION FOR JURY. In such a case, whether plaintiff knew or should have known of the condition of the belting is for the jury, where he

Master and Servant—Continued.

testified that he did not know it was unsupported. *Ferling v. Hines* 433

8. MASTER AND SERVANT (172, 182-1)—INJURIES TO THIRD PERSONS—ACTS OF SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. In an action for injuries in a collision, whether the driver at fault was in defendant's employ at the time is a question for the jury, where it appeared that he was a salesman of defendant's motor trucks, on a salary and commission basis, and owned the automobile but was allowed forty dollars per month for its upkeep and drove it under defendant's license, and at the time had left the defendant's place of business at the close of day, for home, going out of his way to carry another employee of the defendant. *Buckley v. Harkens*.. 468

Measure of Damages:

In general, see DAMAGES, 5-8.
For lot taken up to line of party wall, see EMINENT DOMAIN, 3.
For fraud in sale of moving picture business, see FRAUD, 5.
For breach by seller of goods, see SALES, 7, 9.
For breach of contract by vendor, see VENDOR AND PURCHASER, 9, 10.

Mechanics' Liens:

Contractor's bond to secure laborers and materialmen on public work, see MUNICIPAL CORPORATIONS, 3, 4.

Meeting of Minds:

See CONTRACTS, 1.

Mental Capacity:

To execute a will, see WILLS, 1.

Mental Suffering:

An element of damages, see DAMAGES, 1.
As element of compensatory damages, see TELEGRAPHS AND TELEPHONES.

Merger:

Of contract, see CONTRACTS, 5.

Mines and Minerals:

1. MINES AND MINERALS (16, 17) — CONVEYANCES — LEASE. A talc mining lease will be forfeited in accordance with the stipulation of the parties, requiring continuous operation, where the lessee did not attempt to operate the mill in any commercial sense, but only technically to comply with the requirements of the lease. *Capps v. Western Talc Co*..... 94

Misconduct:

Of juror, see CRIMINAL LAW, 12-14.

Of counsel ground for reversal in criminal prosecutions, see CRIMINAL LAW, 25.

Misrepresentation:

See FRAUD.

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 5, 9.

Mitigation:

Of damages, see DAMAGES, 2, 3.

Modification:

Of contract, see CONTRACTS, 5.

Of decree awarding custody of children, see DIVORCE, 2.

Money:

Deposited in court, see DEPOSITS IN COURT.

Money Received:

Recovery of price paid for land, see VENDOR AND PURCHASER, 8.

Morality:

Of prosecuting witness, see SODOMY.

Mortgages:

Power of court to order renewal of on property affected by *lis pendens*, see DIVORCE, 1.

Creation of equitable lien, see LIENS.

Trust resulting in favor of party advancing money to redeem from foreclosure sale, see TRUSTS.

Motor Vehicles:

Regulation of use of trucks in city street, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Municipal Corporations:

See COUNTIES.

Street railroads, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS (44)—ORDINANCES—VALIDITY. The provisions of a traffic ordinance are independent so that the validity of one does not affect the others, where (1) it required an occupation tax for motor trucks; (2) prohibited loads which permanently injured the streets; (3) fixed minimum loads; and (4) regulated their speed. *White v. Turner*..... 405

Municipal Corporations—Continued.

2. MUNICIPAL CORPORATIONS (45)—ORDINANCES—SUBJECTS AND TITLES. The title of a traffic ordinance expressly providing for the licensing of freight vehicles, is sufficient to embrace a section providing a tax upon motor trucks. *White v. Turner*..... 405

3. MUNICIPAL CORPORATIONS (158) — PUBLIC IMPROVEMENTS — CONTRACTOR'S BONDS — PERSONS SECURED—EMPLOYEES OF MATERIALMAN. One who contracts with a contractor to furnish all the sand and gravel to be used in the construction of a street is not a "subcontractor" but a materialman, though the contract provided that delivery of the said and gravel should be "on the work as directed and required," and that rejected material should be replaced; hence employees of the one furnishing the sand and gravel who failed to give the statutory notice under Rem. Code, § 1159-1, cannot recover on the contractor's bond. *Neary v. Puget Sound Engineering Co.* 1

4. SAME (158, 159-2)—PERSONS SECURED—CONTRACTOR'S BOND—"SUPPLIES"—NOTICE—NECESSITY. Employees of one furnishing gravel to a contractor for a public improvement, who fail to give the statutory notice required under Rem. Code, § 1159-1, of persons furnishing material or "supplies" cannot recover for their services on the contractor's bond. *Neary v. Puget Sound Engineering Co*..... 1

5. MUNICIPAL CORPORATIONS (225)—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICT—"BLOCK." For the purposes of a special assessment upon city blocks abutting upon the street, a fifteen-foot alley 120 feet from the street, not designated upon the plat as either a street or an alley, must be considered as a street and not as an alley bisecting a block, leaving only the abutting block liable to assessment as required by Rem. Code, § 7892-13. *Northern Pacific R. Co. v. Walla Walla*..... 153

6. SAME (258)—PUBLIC IMPROVEMENTS—ASSESSMENTS — FAILURE TO MAKE OBJECTION. When property is included in an assessment roll which is not subject to assessment, the proceedings are void and may be attacked in any manner although no objection was made to the confirmation of the roll. *Northern Pacific R. Co. v. Walla Walla* 153

7. MUNICIPAL CORPORATIONS (267-3) — PUBLIC IMPROVEMENTS — ARBITRARY AND EXCESSIVE ASSESSMENT. It is manifest that straightening out a jog in the street making it more valuable for general use and increasing public traffic over it, affects all property similarly situated, and consequently an assessment of property from which land was taken at seven times the amount assessed against similar tracts, not condemned, is void as arbitrary and made upon a fundamentally wrong basis. *In re Phinney Avenue*..... 262

8. SAME (267-3). Such an assessment against private owners could not be justified by the fact that a portion of the street in front of

Municipal Corporations—Continued.

their lots was in private ownership, which, if asserted, would cut off their access to the street. *In re Phinney Avenue*..... 262

9. SAME (353)—USE OF STREETS—REGULATION OF MOTOR TRUCKS—VALIDITY. A traffic ordinance imposing upon motor trucks an occupation tax, graduated according to the load, is valid; Laws 1919, p. 124, § 34, expressly authorizing local authorities to levy an occupation tax. *White v. Turner*..... 405

10. SAME (353)—VALIDITY—VIOLATION. A traffic ordinance prohibiting the use of motor trucks which permanently injure the street and also loads of more than 24,000 lbs. is enforcible; and the same is violated by permanent injury to the streets regardless of the weight of the load. *White v. Turner*..... 405

11. SAME (353)—VALIDITY. The fact that Rem. Code, § 5561-4, exempts cities of the first class from the provision of the traffic law forbidding the use of all trucks that permanently injure the streets, does not prevent a city of the first class from passing a traffic ordinance forbidding such use. *White v. Turner*..... 405

12. MUNICIPAL CORPORATIONS (389, 390)—STREETS—AUTOMOBILE COLLISION—EVIDENCE—SUFFICIENCY. It is error to dismiss an action for damages to plaintiff's automobile which was bumped by defendant while it was parked at the curb where it had a right to be, where the evidence tended to show that defendant's car could and should have been stopped in time to avoid the collision, if defendant was driving as slowly as she claimed and had not been confused and lost control of herself and of her car. *Anderson v. McLaren*..... 33

13. MUNICIPAL CORPORATIONS (566)—CLAIMS—SUFFICIENCY OF NOTICE—RESIDENCE OF CLAIMANT. A claim for personal injuries against a city of the first class must give the address of the claimant for the six months immediately prior to the time the right of action accrued, as required by Rem. Code, §§ 7995 and 7997, and it is not sufficient to give the address at the date of presenting the claim. *Barton v. Seattle*..... 331

Names:

Of parties in contract for sale of land, see VENDOR AND PURCHASER, 2.

Navigable Waters:

Preference right to purchase shore lands, see PUBLIC LANDS.

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

Necessity:

For condemnation of land for public use, see EMINENT DOMAIN, 1.

For killing elk in protection of property, see GAME.

Negligence:

In preparation of abstracts of title, see ABSTRACTS OF TITLE.
Damages in general, see DAMAGES, 2-7.
In use of highway, see HIGHWAYS.
Of employers, see MASTER AND SERVANT.
Risks assumed by servant, see MASTER AND SERVANT, 7.
Of driver of automobile, see MUNICIPAL CORPORATIONS, 12.
Amendment of complaint at trial, see PLEADING, 2.
Accidents at railroad crossings, see RAILROADS, 2, 3.
In operation of street railroads, see STREET RAILROADS.
Of telegraph or telephone companies in general, see TELEGRAPHS AND TELEPHONES.
In cold storage of meat, see WAREHOUSEMEN.
Injuries by flooding land, see WATERS AND WATER COURSES, 1, 3-5.

1. NEGLIGENCE (6, 38) — CARE AS TO LICENSEES—ENTRANCE TO BUILDING—EVIDENCE—SUFFICIENCY. It cannot be said as a matter of law that the proximity and similarity of a stairway door and of entrance doors of a large office building were not calculated to mislead and deceive one who attempted to enter the building and fell down the stairway, which commenced but two to four inches from the stairway door, which was mistaken for the entrance door. *Johnson v. Smith*..... 311

2. NEGLIGENCE (10, 38)—ACTS CONSTITUTING—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILDREN—EVIDENCE—SUFFICIENCY. The negligence of a school district in leaving an open pit on the school grounds unguarded is a question for the jury, where it was left open and unguarded for seven months, surrounded by loose boards calculated to tempt children in play. *Hutchins v. School District No. 81 of Spokane County*..... 548

3. SAME (22, 39)—CONTRIBUTORY NEGLIGENCE—CHILDREN—EVIDENCE—SUFFICIENCY. Contributory negligence, as a matter of law, is not shown by evidence that a boy ten years old was attempting to hop across a plank over an open pit on the school grounds, when he lost his balance, it appearing that he was answering a challenge and did as other boys had been doing. *Hutchins v. School District No. 81 of Spokane County*..... 548

4. SAME (39) — CONTRIBUTORY NEGLIGENCE OF INVITEE. In such a case it cannot be said, as a matter of law, that one is guilty of contributory negligence in falling down the stairs, where the first step through the door would land one not on a platform but on the descending stairs. *Johnson v. Smith*..... 311

Negotiable Instruments:

See BILLS AND NOTES.

Negroes:

Exclusion from theater by reason of color, see THEATERS AND SHOWS; TORTS.

Newly Discovered Evidence:

Ground for new trial, see CRIMINAL LAW, 15-19; NEW TRIAL, 2.

New Promise:

As affecting debt discharged in bankruptcy, see BANKRUPTCY.
Within statute of limitations, see LIMITATION OF ACTIONS, 1.

New Trial:

In criminal prosecutions, see CRIMINAL LAW, 12-19.

1. NEW TRIAL (21-24) — VERDICT CONTRARY TO EVIDENCE. The discretion of the trial court in granting a new trial upon conflicting evidence will not be disturbed on appeal where the facts were such that the trial court might feel that they did not justify the verdict. *Boulton v. Seattle*..... 234

2. NEW TRIAL (40)—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT. A new trial for newly discovered evidence should not be granted where it merely corroborated a party upon a disputed point, and would not require a different result. *Hosner v. McDonnell*..... 489

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Filing proof of service of notice of appeal, see APPEAL AND ERROR, 5.
Defenses to bill or note, see BILLS AND NOTES, 1-4.
To party of injunction order, see CONTEMPT.
Judicial notice, see EVIDENCE, 1.
Proceedings for sale of land of decedent under order of court, see EXECUTORS AND ADMINISTRATORS, 6.
Of intention to exercise option for renewal of lease, see LANDLORD AND TENANT, 5.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 7.
Of claim against contractor's bond, see MUNICIPAL CORPORATIONS, 3, 4.
Claim against city for personal injuries, see MUNICIPAL CORPORATIONS, 13.

Objections:

For purpose of review, see APPEAL AND ERROR, 7.
On criminal appeals, see CRIMINAL LAW, 21.
To selection of juror, see JURY, 2.
To local assessment, see MUNICIPAL CORPORATIONS, 6.
To evidence, sufficiency, see TRIAL, 2.

Obstructions:

Of flow of surface waters, see WATERS AND WATER COURSES, 1.

Occupation:

Regulation of as exercise of police power, see CONSTITUTIONAL LAW, 2.

Municipal regulation of occupations and employments, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Officers:

Corporate officers, see CORPORATIONS, 6.

Salaries of superior court judges, see COUNTIES, 1.

Liability of community property for torts of, see HUSBAND AND WIFE, 5.

Opinion Evidence:

In civil actions, see EVIDENCE, 5.

Examination of experts, see WITNESSES, 3, 4.

Option:

To renew lease, see LANDLORD AND TENANT, 4-6.

Oral Agreements:

Prior oral agreement collateral to written contract, see CONTRACTS, 4.

Oral Contracts:

See CONTRACTS, 2, 4, 7; FRAUDS, STATUTE OF.

Oral Evidence:

See EVIDENCE, 3, 4.

To identify contract referred to in writing, see FRAUDS, STATUTE OF, 3.

Orders:

Disobedience of as contempt, see CONTEMPT.

Of public service commission, see ELECTRICITY.

Ordinances:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Violation of by driver of auto truck as contributory negligence, see STREET RAILROADS, 1.

Parent and Child:

Descent of property, see DESCENT AND DISTRIBUTION.

Custody and support of children on divorce, see DIVORCE, 2.

1. PARENT AND CHILD (3, 4)—CUSTODY—WELFARE OF CHILD—COMPETENCY OF PARENT. Upon habeas corpus proceedings by a mother to obtain from the father the custody of a son eight years of age, the

Parent and Child—Continued.

child's welfare is a primary consideration, and the discretion of the lower court in awarding the custody to the father will not be disturbed, where the evidence indicated an unusually close association between them and better school facilities and indicated that conditions could not be bettered by the change. *State ex rel. Deshler v. Deshler* 507

Parol Agreements:

In general, see CONTRACTS, 2, 4, 7.

Parol Evidence:

See EVIDENCE, 3, 4.

To vary note, see BILLS AND NOTES, 7.

To identify contract referred to in writing, see FRAUDS, STATUTE OF, 3.

Parties:

Persons entitled to appeal, see APPEAL AND ERROR, 1.

Entitled to allege error, see APPEAL AND ERROR, 2.

Violation of order by one not a party as contempt, see CONTEMPT.

Rights and liabilities as to costs, see COSTS.

Rights as to money paid into court, see DEPOSITS IN COURT.

Parties to judgment, see JUDGMENT, 1.

Persons concluded by judgment, see JUDGMENT, 6, 7.

Unlawful detainer of demised premises, see LANDLORD AND TENANT. 10, 11.

Entitled to defense of statute, see LIMITATION OF ACTIONS, 2.

Persons secured by contractor's bond, see MUNICIPAL CORPORATIONS, 3, 4.

Informality in referring to in contract, see VENDOR AND PURCHASER, 2.

Partition:

Personal judgment against client for attorney's fees, on repudiation of contract, see ATTORNEY AND CLIENT, 3.

1. PARTITION (17)—INCIDENTAL RELIEF. In an action for partition, in passing upon a claim to the land, the court may determine a claim for legal and professional services rendered to the claimant, and give full and complete relief to all parties to the controversy *Beck v. Boucher* 574

Partnership:

Appointment of administrator for, see EXECUTORS AND ADMINISTRATORS, 1.

1. PARTNERSHIP (10)—RELATIONS—PRESUMPTIONS. Where a partnership is shown, equal interest will be presumed in the absence of evidence as to the interest. *Simon v. Levy* 556

Partnership—Continued.

2. PARTNERSHIP (14, 16)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the existence of a partnership where it appears that letters passing between the deceased, during his lifetime, and the appellant show that deceased and appellant were jointly interested in goods shipped from Alaska to Seattle for the purpose of opening and conducting a jobbing and retail mercantile business in Seattle. *Simon v. Levy*..... 556

3. PARTNERSHIP (76)—DEATH—RIGHTS OF SURVIVOR—ADMINISTRATION OF PARTNERSHIP PROPERTY. The surviving partner is entitled to administration of the partnership property, if, within five days from the filing of the inventory, he apply for the administration thereof; and if he so applies, he shall be entitled to administer the partnership property if the court finds him to be qualified. *Simon v. Levy* 556

Part Payment:

Within statute of limitations, see LIMITATION OF ACTIONS, 1.

Party Walls:

As element of damages, see EMINENT DOMAIN, 2, 3.

1. PARTY WALLS (2) — RIGHTS AND LIABILITIES. Where a party wall is built by one owner, and the other merely has an option to use it on paying half of the cost, the wall belongs to the builder. *Walla Walla v. Jensen Co*..... 134

Payment:

See ACCORD AND SATISFACTION.
Subscription for stock, see CORPORATIONS, 1-5.
As unlawful preference, see FRAUDULENT CONVEYANCES, 2.
Of outlawed debt by failing debtor, see LIMITATION OF ACTIONS, 2.
Of taxes, construction of provision in contract, see VENDOR AND PURCHASER, 4.
Recovery of price paid for land, see VENDOR AND PURCHASER, 8.

Performance:

Rights on partial performance of contract, see CONTRACTS, 6.
Of contract for sale of land, see VENDOR AND PURCHASER, 7.

Personal Injuries:

Measure of damages, see DAMAGES, 6, 7.
From negligence in use of highway, see HIGHWAYS.
Liability or indemnity insurance, see INSURANCE.
To employee or third person, see MASTER AND SERVANT.
Collision with automobile, see MUNICIPAL CORPORATIONS, 12.
Claims against city for, see MUNICIPAL CORPORATIONS, 13.

Personal Injuries—Continued.

In general, see NEGLIGENCE.

To traveler on highway crossing railroad, see RAILROADS, 2, 3.

To persons on or near street railroad tracks, see STREET RAILROADS.

Personal Liberty:

Constitutional guaranties, see CONSTITUTIONAL LAW, 3.

Personal Security:

Constitutional guaranties, see CONSTITUTIONAL LAW, 3.

Petition:

For allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 2.

Place:

Criminal jurisdiction as dependent on locality of offense, see CRIMINAL LAW, 2.

Pleading:

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 9.

For damages in general, see DAMAGES, 9.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

For unlawful detainer by tenant, see LANDLORD AND TENANT, 12.

Necessity for pleading general laws, see STATUTES, 4.

1. PLEADING (94)—DEMURRER—WAIVER. A demurrer is waived by consenting that the case be tried on the merits. *White v. Turner* 405

2. PLEADING (104) — AMENDMENTS—TO CONFORM TO PROOF. It is not an abuse of discretion to permit a trial amendment to a complaint alleging negligence in maintaining an open pit on school grounds, to conform to proof that the place was attractive to children, which had been received without objection. *Hutchins v. School District No. 81 of Spokane County*..... 548

Police Power:

Of state, see CONSTITUTIONAL LAW, 1, 2.

Policy:

Of insurance, see INSURANCE.

Possession:

Illegal possession of liquor, see INTOXICATING LIQUORS.

As indicating exercise of option to renew lease, see LANDLORD AND TENANT, 5, 6.

Of property by receiver, see RECEIVERS.

As essential to enforcement of contract for trade of lands, see SPECIFIC PERFORMANCE, 2.

Powers:

Of public service commission to regulate rates, see ELECTRICITY.
Of guardian *ad litem*, see INFANTS, 2.
Of clerk in entering judgment, see JUDGMENT, 2.
Of court to correct judgment, see JUDGMENT, 3, 4.
Of public service commission as to highway crossings, see RAILROADS, 1.
Of state to punish for treason, see TREASON.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; NEW TRIAL; PLEADING.

Preferences:

In fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.
Right to purchase tide or shore lands, see PUBLIC LANDS.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 9-11.
Local prejudice as ground for change of venue in criminal prosecutions, see CRIMINAL LAW, 3.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 22-25.

Premises:

Dangerous premises, see NEGLIGENCE.

Presumptions:

On appeal, see APPEAL AND ERROR, 7.
As to good faith in inception of note, see BILLS AND NOTES, 3.
As to intentional delivery of note, see BILLS AND NOTES, 6.
As to interest of partner, see PARTNERSHIP, 1.

Principal and Surety:

Liability or indemnity bonds, see INSURANCE.
Liabilities of sureties on contractor's bond, see MUNICIPAL CORPORATIONS, 3, 4.

Privity:

Of contract, see ABSTRACTS OF TITLE, 1.

Process:

For sale of property of decedents, see EXECUTORS AND ADMINISTRATORS, 6.
In forcible entry and detainer, see FORCIBLE ENTRY AND DETAINER.

Promise:

As affecting debt discharged in bankruptcy, see BANKRUPTCY.

Promissory Notes:

See BILLS AND NOTES.

Proof of Service:

Of notice of appeal, time for filing, see APPEAL AND ERROR, 5.

Property:

Measure of damages for injuries to property, see DAMAGES, 5.
Taking for public use, see EMINENT DOMAIN.
Protection of in unlawful killing of elk, see GAME.
Authority of guardian as to property of ward, see GUARDIAN AND WARD.
Separate or community character of, see HUSBAND AND WIFE.
Obtained by false pretenses, see LARCENY, 1.
Effect of appointment of receiver, see RECEIVERS.

Public Improvements:

Liability of county for damages from, see COUNTIES, 2.
By cities, see MUNICIPAL CORPORATIONS, 3-8.

Public Lands:

1. PUBLIC LANDS (96)—DISPOSAL BY STATE OF TIDE AND SHORE LANDS—PREFERENTIAL RIGHTS—ABUTTING OWNER. The owner of a ferry is not entitled to any preference right to shore lands in a navigable stream by reason of improvements of his predecessors in the construction of a wharf thereon, where it had served no useful purpose for over twenty years and had disappeared more than ten years ago. *Northern Pacific R. Co. v. Hoven*..... 130

2. SAME (98) — PREFERENTIAL RIGHTS — IMPROVER. The owner of a ferry is not entitled to any preference right to purchase shore lands in a navigable stream by reason of having maintained since 1908 or 1909, by permission of the city, a temporary float within the limits of a street extended into the water. *Northern Pacific R. Co. v. Hoven* 130

3. PUBLIC LANDS (119) — NAVIGABLE WATERS (32) — SHORES AND BANKS—RIGHT OF OWNERS—INJUNCTION. The abutting owner, entitled to a preference right to purchase shore lands on a navigable stream, is entitled to an injunction against a stranger to prevent threatened acts of trespass by way of permanent obstructions cutting off his access to the stream. *Northern Pacific R. Co. v. Hoven* 130

Public Policy:

Validity of contract for attorney's fees, see ATTORNEY AND CLIENT, 2.

Public Service Commission:

Regulation of rates for electricity, see ELECTRICITY.
Review of findings of in fixing gas rates, see GAS.
Authority as to highway crossings, see RAILROADS, 1.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Punishment:

Of habitual criminals, procedure, see CRIMINAL LAW, 26.
Cruel or unusual punishment, see CRIMINAL LAW, 27.

Qualifications:

Of juror, see JURY, 1.

Quantity:

Of goods sold, construction of contract, see SALES, 2.

Quantum Meruit:

See CONTRACTS, 6.

Question for Jury:

Evidence of agreement sufficient to take case to jury, see CONTRACTS, 7.
Contributory negligence in turning to left to avoid collision, see HIGHWAYS, 1.
In action for injury to servant or third person, see MASTER AND SERVANT, 5, 7, 8.
Signals at railroad crossing, see RAILROADS, 2.
Negligence at crossing, see STREET RAILROADS.
Injury to beef in storage through negligence of bailee, see WAREHOUSEMEN.
In action for flooding lands, see WATERS AND WATER COURSES, 4.

Railroads:

Injuries to employees, see MASTER AND SERVANT, 4, 6.
Railroads in city street, see STREET RAILROADS.

1. RAILROADS (31) — CONSTRUCTION AND MAINTENANCE — CROSSING HIGHWAYS—POWERS OF PUBLIC SERVICE COMMISSION—STATUTES. Under Rem. Code, § 8733-2, providing that highways shall not cross any railroad at grade without authority from the public service commission, and Id., § 8733-3, providing that the commission shall order a grade crossing if it is impracticable to cross above or below grade, the commission may only determine the kind of crossing to be established, where a city, under the power conferred by Rem. Code, § 7671-14, to open streets, has decided that there shall be a crossing. *State ex rel. Toppenish v. Public Service Commission*. 301

2. RAILROADS (61, 71)—ACCIDENT AT CROSSING—NEGLIGENCE—FAILURE TO SIGNAL—EVIDENCE—QUESTION FOR JURY. Whether a train crew sounded warnings at a railroad crossing is a question for the jury, where two witnesses testified that they were in a position to hear and would have heard a whistle or bell when the train passed if sounded, and heard none, although employees on the train testified

Railroads—Continued.

that the bell was rung and whistles blown. *Smith v. Inland Empire R. Co.* 441

3. SAME (64-66) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. Whether deceased, driving a motor truck, and struck at a crossing by an electric train, was guilty of contributory negligence is a question for the jury, where the train approached without warning in a cut, on a down grade, the train men first saw the truck forty feet away when its front wheels were upon the track, and no one saw what the deceased did before he attempted to cross. *Smith v. Inland Empire R. Co.* 441

Rape:

1. RAPE (1, 27)—ELEMENTS OF OFFENSE—UNCONSCIOUSNESS OF FEMALE—EVIDENCE OF—SUFFICIENCY. Accused may be guilty of rape as defined by Rem. Code, § 2435, subd. 5, by having sexual intercourse with a woman who was at the time known by him to be "unconscious of the nature of the act," notwithstanding she was not unconscious in the sense of having lost her senses, it only being necessary that she did not know what he was doing. *State v. Ely*..... 185

Rates:

Regulation of, see ELECTRICITY.

Review of findings of public service commission in fixing gas rates, see GAS.

Real Property:

Damages from overflowing, see DAMAGES, 5, 10.

Sale of real estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6, 7.

Authority of guardian as to property of ward, see GUARDIAN AND WARD.

Contracts for conveyance, see VENDOR AND PURCHASER.

Receipts:

Parol evidence varying receipts, see EVIDENCE, 3.

Receivers:

Stay of proceedings on appeal from order appointing receiver, see APPEAL AND ERROR, 6.

1. RECEIVERS (45) — TITLE TO PROPERTY — EFFECT OF APPOINTMENT. The appointment of a receiver to collect rents coming from a building does not put the building itself in *custodia legis*, so as to prevent the sheriff from levying an execution thereon to satisfy the judgment in the action in which the receiver was appointed. *Daniel v. Reid*..... 211

Receivers—Continued.

2. SAME (45). A judgment debtor who opposed the appointment of a receiver to collect rents and appealed therefrom, giving a supersedeas bond, is not in a position to assert that the property is in *custodia legis*. *Daniel v. Reid*..... 211

Reconveyance:

From purchaser to vendor, see VENDOR AND PURCHASER, 6.

Records:

Record of judgment, see JUDGMENT, 3.

Reduction:

Duty to mitigate damages, see DAMAGES, 2, 3.

Regulation:

Of rates for electric companies, see ELECTRICITY.

Rehearing:

See NEW TRIAL.

Release:

See ACCORD AND SATISFACTION.
Liability on insurance policy, see INSURANCE, 2.

Reliance:

On false statements inducing sale, see FRAUD, 2.

Removal of Causes:

Change of venue or place of trial, see VENUE.

Renewal:

Of lease, see LANDLORD AND TENANT, 4-6.

Rent:

See LANDLORD AND TENANT, 4, 7-9, 12, 15, 17.
Receiver to collect rents, see RECEIVERS.

Repeal:

Of statute, see STATUTES, 2.

Representation:

Representation of corporations by officers or agents, see CORPORATIONS, 7.

Reputation:

Excessive damages for injury to, see DAMAGES, 8.

Requests:

For instructions in criminal prosecutions, see CRIMINAL LAW, 11.
For instructions in civil actions, see TRIAL, 4-6.

Rescission:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract, see CONTRACTS, 3.

Of contract for sale of land, see VENDOR AND PURCHASER, 5-8.

Residence:

Qualification of surviving partner to administer property, see EXECUTORS AND ADMINISTRATORS, 1.

As affecting right of surviving spouse to allowance, see EXECUTORS AND ADMINISTRATORS, 3.

Statement of claimant's residence in claim against city, see MUNICIPAL CORPORATIONS, 13.

Res Judicata:

See JUDGMENT, 5-7.

Resulting Trusts:

See TRUSTS.

Revenue:

See TAXATION.

Reversal:

Of judgment after execution sale, effect, see EXECUTION.

Review:

See HABEAS CORPUS.

In civil actions, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 20-25.

Of findings of public service commission in fixing gas rates, see GAS.

Revival:

Of debt discharged in bankruptcy, see BANKRUPTCY.

Riparian Owners:

Preferential right to purchase tide or shore lands, see PUBLIC LANDS.

Risks:

Assumed by employee, see MASTER AND SERVANT, 7.

Roads:

Streets in cities, see MUNICIPAL CORPORATIONS, 1, 2, 5, 7, 8, 10-12.

Robbery:

Harmless error in admission of evidence, see CRIMINAL LAW, 24.

1. ROBBERY (7)—EVIDENCE—ADMISSIBILITY. It is a sufficient identification of a revolver, used in an attempted robbery, for the witness to testify that it closely resembles the one used by the accused and from its appearance witness believes it to be the same. *State v. Jensen* 401

Safe Place to Work:

See MASTER AND SERVANT, 5.

Salary:

Of superior court judges, see COUNTIES, 1.

Sales:

Purchase of stock by majority stockholders with funds of corporation, see CORPORATIONS, 1-5.

On execution, see EXECUTION.

Of property of decedent under order of court, see EXECUTORS AND ADMINISTRATORS, 6-7.

Fraud inducing sale, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2-4.

Bona fide purchasers of property obtained by false pretenses, see LARCENY, 1.

Of logs, see LOGS AND LOGGING.

Of real property, see VENDOR AND PURCHASER.

1. SALES (12, 126, 129)—VALIDITY—CONTRACT BY CORRESPONDENCE—DELIVERY — ACTION FOR DAMAGES — CONDITIONS PRECEDENT. Upon a sale of 100 tons of hay, delivery to commence about August 15, without specifying time for completion, the buyer's letter, after receiving the first shipment, to the effect that just at present it was not in need of further shipments, is not a repudiation of the order; and the seller must make a tender of the balance before bringing suit for breach of contract. *Wagner Co. v. Craib & Co*..... 139

2. SALES (29)—CONTRACT—CONSTRUCTION — SUBJECT-MATTER — QUANTITY AND ASCERTAINMENT. A contract to sell a mill's "entire output" of lath up to a specified date, to be air or kiln dried, means the output of air or kiln dried lath, where the kiln capacity was limited to the knowledge of the parties, and does not include lath cut which could not be dried within the period stipulated. *Northup-Hage Lumber Co. v. Eureka Cedar Lumber & Shingle Co*..... 669

3. SALES (85)—OPERATION AND EFFECT—TRANSFER OF TITLE—INTENT. Under the rule that the intent governs the passing of title, a definite quantity of wheat passed to the buyer January 20, at the time the contract was made and the price paid, although the contract provided that it was to be delivered f. o. b. cars at D. to be forwarded before April 1, where the wheat, part of a quantity of uniform quality sacked and stored in a warehouse, was inspected and insurance policies thereon immediately assigned to the buyer. *Mayer v. Gibson*..... 394

4. SALES (96, 99)—RIGHTS OF BUYER—TITLE OF BONA FIDE PURCHASER —GOODS OBTAINED BY FALSE PRETENSES. Where the owner of an automobile voluntarily delivered the possession with the intent to

Sales—Continued.

pass the title in a trade for another car, which had been stolen, without any element of trespass on the part of his vendees, a *bona fide* purchaser of his car from such vendees is protected under the rule that, where one of two innocent persons must suffer by the fraud of a third, the loss must fall upon the one who made it possible. *Linn v. Reid* 609

5. SALES (113) — WARRANTIES — BREACH — WARRANTY OF QUALITY. Findings that peas complied with a contract calling for Canadian yellows of "good stock, in good merchantable condition" are not sustained, where many samples were taken from the shipment and all the witnesses admitted that the samples did not comply with the contract as to quality, kind or condition. *Teweles Seed Co v. Fairbanks* 321

6. SALES (119) — VENDOR'S LIEN — WAIVER. A seller's authority to a buyer of logs to take possession, which was done, is a waiver of a vendor's lien for the price. *Hosner v. McDonnell* 489

7. SALES (154) — DAMAGES (7¶) — MEASURE — FAILURE TO DELIVER PROPERTY. In an action to recover damages for breach of an executory contract to sell pig iron, in failing to furnish the commodity contracted for, after the plaintiff refused to accept material offered, the measure of damages is the sum paid on the contract and the loss of profits that would have been made upon a resale. *Sussman v. Mitsui & Co* 294

8. SAME (164) — REMEDIES OF BUYER—EVIDENCE—ADMISSIBILITY. Upon an issue as to the quality of peas, the trade custom to have samples taken by a disinterested person is not exclusive, and does not prevent an interested party from taking samples. *Teweles Seed Co. v. Fairbanks* 321

9. SAME (165) — REMEDIES OF BUYER — DAMAGES — DIFFERENCE BETWEEN PRICE PAID AND MARKET VALUE. Where defective peas shipped from Seattle could not be examined until their arrival at Milwaukee, and were rejected, held subject to the shipper's order, and finally sold on the open market in Milwaukee for what they would bring, the measure of the buyer's damages is properly based upon the market price at Milwaukee. *Teweles Seed Co. v. Fairbanks* 321

Salvage:

Right of seamen to claim, see SEAMEN.

Satisfaction:

See ACCORD AND SATISFACTION.

Schools and School Districts:

Negligence in leaving open pit on school ground, see NEGLIGENCE, 2, 3.

Seamen:

1. SEAMEN (1) — WHO ARE SEAMEN. The fishermen and crew of a fishing boat signing shipping articles come within the designation of seamen and their rights as to wages in case of salvage work are governed by those of seamen. *Danielson v. Libby, McNeill & Libby* 340

2. SEAMEN — RIGHT TO CLAIM SALVAGE. Seamen may not claim compensation for salvage upon abandonment of the ship unless the abandonment was by order of the master. *Danielson v. Libby, McNeill & Libby*..... 340

3. SEAMEN (2) — SHIPPING ARTICLES — COMPENSATION ON SALVAGE. Under shipping articles providing that the seamen would do such work as was necessary to protect the ship if endangered, without extra compensation, and that no salvage should be earned or paid except after shipwreck or abandonment, seamen are not entitled to salvage for services, where the ship went aground and the seamen, after hazardous work in saving the vessel and cargo, were paid their wages and discharged and the vessel was finally floated and taken to port, never having been abandoned. *Danielson v. Libby, McNeill & Libby*..... 340

Seduction:

Harmless error in ruling as to information, see CRIMINAL LAW, 22. Duplicity in charging offense, see INDICTMENT AND INFORMATION, 3.

1. SEDUCTION (13) — CRIMINAL RESPONSIBILITY — QUESTION FOR JURY. In a prosecution for seduction, guilt is not disproved by the birth of a well developed child within eight months and one week after the act of intercourse; since it is within medico-legal latitude of the period of gestation. *State v. Parker*..... 428

Selection:

Of juror, denial of challenge to, see JURY, 2.

Sentence:

For crime, see CRIMINAL LAW, 26, 27.

Separate Estate:

Of married women, see HUSBAND AND WIFE, 1.

Servants:

See MASTER AND SERVANT.

Service:

Of notice of appeal, filing proof of, see APPEAL AND ERROR, 5.
Prior service as affecting competency of juror, see JURY, 1.

Settlement:

See ACCORD AND SATISFACTION.

Shipping:

Right of seamen to claim salvage, see SEAMEN.

Shipping Articles:

See SEAMEN.

Shore Lands:

Preference right to purchase, see PUBLIC LANDS.

Signals:

On approaching railroad crossings, see RAILROADS, 2.

Sodomy:

Admission by accused as evidence, see CRIMINAL LAW, 5.

Impeachment of prosecuting witness by proof of immoral habits, see WITNESSES, 6.

1. SODOMY—DEFENSES—IMMORALITY OF PROSECUTING WITNESS. In a prosecution for sodomy, it is proper to instruct that the moral character of the prosecuting witness is immaterial, except upon the question of his credibility. *State v. Demas* 596

Special Deposits:

See BANKS AND BANKING.

Special Laws:

See STATUTES, 2.

Specific Performance:

1. SPECIFIC PERFORMANCE (13-2) — CONTRACTS ENFORCEABLE — COMPLETENESS. Specific performance of a contract for the trade of lands will not be denied for lack of completeness, in that interest was to be computed, where the amount was ascertainable by the computation. *Le Marinel v. Bach* 651

2. SAME (17) — CONTRACTS ENFORCEABLE — POSSESSION. Specific performance of a trade of lands does not necessarily fail because the parties were not put in possession of the properties. *Le Marinel v. Bach* 651

3. SAME (28) — SUFFICIENCY OF PERFORMANCE OR TENDER. Specific performance of a trade of lands should not fail on account of an insufficient tender of performance, where the defendants based their claim in the first instance on the ground of fraud; since the court may permit a sufficient tender to be made. *Le Marinel v. Bach* .. 651

States:

Right of state to review of criminal prosecution, see CRIMINAL LAW, 20.

Disposal of tide or shore lands, see PUBLIC LANDS.

Power to punish for treason, see TREASON.

Statute of Frauds:

See FRAUDS, STATUTE OF.

Statutes:

See FORCIBLE ENTRY AND DETAINER; FRAUDS, STATUTE OF; LARCENY, 1.
Granting special privileges or immunities, see CONSTITUTIONAL LAW, 5-7.
Fixing salaries of superior court judges, see COUNTIES, 1.
Uncertainty in definition of crime, see CRIMINAL LAW, 1.
As to extent of punishment in criminal cases, see CRIMINAL LAW, 26, 27.
Regulation of rates of power companies, see ELECTRICITY.
Allowance to surviving spouse, see EXECUTORS AND ADMINISTRATORS, 2, 3.
Illegal possession of liquor, see INTOXICATING LIQUORS.
Statutes of limitation, see LIMITATION OF ACTIONS.
Awards to workman for permanent partial disability, see MASTER AND SERVANT, 2, 3.
City ordinances, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.
Highway crossings, see RAILROADS, 1.
Change of judges, see VENUE.

1. STATUTES (22) — TITLES AND SUBJECTS — SUFFICIENCY. The title to the criminal syndicalism act, Laws 1919, p. 518, § 1, sufficiently indicates the particular subject and is "not too general for any purpose," as the title need not be an index to the act. *State v. Hennessy* 351

2. STATUTES (45)—REPEAL—IMPLIED REPEAL OF SPECIAL BY GENERAL ACT. Rem. Code, § 243, relating to *lis pendens* is a general act and does not repeal the divorce statute, Id., § 998, which is a special statute; since repeals by implication in such a case will arise only where the repugnancy between the two statutes is very clear. *Carney v. Carney*..... 268

3. STATUTES (56, 65)—CONSTRUCTION—INTENT—HISTORY OF ACT. In construing an act, the history of the act, the ordinary use of words at the time of the passage of the act and the meaning adopted at that time, should be considered. *Linn v. Reid*..... 609

4. STATUTES (93-96) — PLEADING — NECESSITY OF PLEADING GENERAL STATUTE. Rem. Code, § 2686, making it a misdemeanor to deny to any person because of race, creed or color, the full privileges of any place of public resort or amusement, being a general and not a special statute, need not be specially pleaded in an action to enforce a civil remedy for wrongful discrimination. *Anderson v. Pantages Theatre Co.* 24

Stipulations:

Waiving right to allege error, see APPEAL AND ERROR, 2.

Stock:

Corporate stock, see CORPORATIONS, 1-5.

Stockholders:

Of corporation, see CORPORATIONS, 1-5.

Storage:

See WAREHOUSEMEN.

Street Railroads:

1. STREET RAILWAYS (20, 30) — COLLISION WITH VEHICLES—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. The violation of a city ordinance does not make the driver of an auto truck in collision with a street car guilty of contributory negligence as a matter of law where it was not the proximate cause of the accident. *Boulton v. Seattle* 234

2. SAME. The contributory negligence of the driver of a truck in driving upon a street railway crossing is a question for the jury, where there was a dispute as to the speed of a street car approaching the crossing. *Boulton v. Seattle* 234

Streets:

See MUNICIPAL CORPORATIONS, 1, 2, 5, 7, 8, 10-12.
Negligent use of highway, see HIGHWAYS.
Crossing railroad tracks, see RAILROADS, 1.

Subletting:

Of lease, see LANDLORD AND TENANT, 1-3, 10, 11, 13, 14, 17, 18.

Summons:

Time for service, see FORCIBLE ENTRY AND DETAINER.

Supersedeas:

On appeal or writ of error, see APPEAL AND ERROR, 6.

Supplies:

Recovery under contractor's bond for supplies furnished, see MUNICIPAL CORPORATIONS, 3, 4.

Support:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 2-5.

Surface Waters:

See WATERS AND WATER COURSES, 1.

Taxation:

Negligence of abstracter in reporting payment of assessment lien, see ABSTRACTS OF TITLE.

Taxation—Continued.

Occupation tax for motor trucks, see MUNICIPAL CORPORATIONS, 1, 2, 9-11.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 5-8.

Provision in contract for payment of taxes, see VENDOR AND PURCHASER, 4.

1. TAXATION (229) — INHERITANCE TAX—EXEMPTIONS. Extrinsic evidence is admissible to show the charitable purpose of a certain "Home for Boys," and that a bequest for its use was, therefore, not subject to the inheritance tax, under Laws of 1917, p. 597, § 7, exempting certain charitable bequests. *In re Foss' Estate*..... 681

2. SAME. Where at the time of a bequest to a home for boys, it was exclusively maintained for the support and education of orphaned or indigent children, it is expressly exempted from the inheritance tax by Laws of 1917, p. 597, § 6. *In re Foss' Estate*..... 681

3. TAXATION (229) — INHERITANCE TAX—EXEMPTIONS. The rule that exemptions from the inheritance tax are to be strictly construed and the beneficiary clearly within the statutory provisions, is qualified as to charitable bequests, which should be upheld and given effect whenever possible. *In re Foss' Estate*..... 681

Telegrams:

Parol evidence to vary meaning of, see EVIDENCE, 4.

Telegraphs and Telephones:

1. TELEGRAPHS AND TELEPHONES (14)—DAMAGES (19)—MENTAL SUFFERING. Compensatory damages for mental anguish cannot be recovered by a telephone subscriber who changed his residence and was required to take a new number, and was humiliated and annoyed by unintentional negligence on the part of operators in reporting his old number as "temporarily disconnected," where there was no evidence of any physical or financial injury or loss. *Litchman v. Pacific Telephone and Telegraph Co*..... 149

Tenancy in Common:

See DESCENT AND DISTRIBUTION.

Partition of property held in common, see PARTITION.

1. TENANCY IN COMMON (2-1)—TITLE AND RIGHTS IN GENERAL. Where the surviving husband has become tenant in common with his children of community property, his conveyance can pass title only to his one-half interest. *Goulette v. Goulette*..... 689

Tender:

Disposition of money paid into court, see DEPOSITS IN COURT.

Of goods by seller, see SALES, 1.

As affecting specific performance of contract, see SPECIFIC PERFORMANCE, 3.

Term:

Of leases, see LANDLORD AND TENANT, 2.

Testamentary Capacity:

See WILLS, 1.

Theaters and Shows:

Damages for excluding negro from seat in theater, see DAMAGES, 1, 8.
Exclusion of negro from seat in theater, see TORTS.

1. THEATERS AND SHOWS — EXCLUSION OF PERSONS BY REASON OF COLOR — LIABILITY. Under Rem. Code, § 2686, making it a misdemeanor to deny to any person because of race, creed or color, the full privileges of any place of public resort or amusement, the proprietor of a theater cannot refuse to admit a negro to box seats and require him to take seats in the balcony; and a negro wrongfully discriminated against has his civil remedy in tort therefor. *Anderson v. Pantages Theatre Co*..... 24

Time:

For service of notice of appeal, see APPEAL AND ERROR, 5.
For service of summons, see FORCIBLE ENTRY AND DETAINER.
For entry of judgment, see JUDGMENT, 2.
Computation of period of limitations, see LIMITATION OF ACTIONS, 1.
To move for change of venue, see VENUE, 2.

Title:

Liability of examiners of titles, see ABSTRACTS OF TITLE.
Effect of intestacy, see DESCENT AND DISTRIBUTION.
Of ordinance, see MUNICIPAL CORPORATIONS, 2.
Effect of appointment of receiver, see RECEIVERS.
Transfer of title on sale of goods, see SALES, 3.
Of purchaser of goods obtained by false pretenses, see SALES, 4.
Of statutes, see STATUTES, 1.
Tenants in common, see TENANCY IN COMMON.

Torts:

See FORCIBLE ENTRY AND DETAINER; FRAUD.
By counties, see COUNTIES, 2.
Measure of damages, see DAMAGES, 5-8.
Negligence in use of highway, see HIGHWAYS.
Liability of community property for torts of spouses, see HUSBAND AND WIFE, 5.
Personal injuries, see NEGLIGENCE.
Negligent operation of railroads, see RAILROADS, 2, 3.
Injuries caused by operation of street cars, see STREET RAILROADS.
Exclusion of negro from seat in theater, see THEATERS AND SHOWS.

Torts—Continued.

1. TORTS (1)—ACTS CONSTITUTING. The gravamen of an action for wrongfully discriminating against a negro by excluding him from seats in a theater, that he had purchased, contrary to the mandate of a statute, is in tort. *Anderson v. Pantages Theatre Co*..... 24

Transfer:

Of corporate shares, see CORPORATIONS, 1-5.

Treason:

1. TREASON—OFFENSES—POWERS OF STATE. The syndicalism statute, Laws 1919, p. 518, § 1, against effecting or resisting any industrial, economic, social or political change in any of the ways specified, is not an attempt to punish constructive treason beyond the power of the state, or in violation of the Federal constitution, art. 3, § 3, providing that treason against the United States shall only consist of levying war against them, etc.; since the state may pass laws to aid or assist the national government and is one of its component parts. *State v. Hennessy*..... 351

Trees:

Sale of logs, see LOGS AND LOGGING.

Trespass:

Injunction to protect rights of abutting owner of shore lands, see PUBLIC LANDS, 3.

Trial:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 3, 4.
Review of findings in trial by court, see APPEAL AND ERROR, 8.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 9-11.
In criminal prosecutions, see CRIMINAL LAW.
Harmless error in setting case for trial, see CRIMINAL LAW, 23.
Instructions on assessment of damages, see DAMAGES, 9.
Instructions as to contributory negligence in turning to left to avoid collision, see HIGHWAYS, 2, 3.
Judgment notwithstanding verdict, see JUDGMENT, 1, 3.
Competency of and challenge to jurors, see JURY.
Instructions in unlawful detainer action, see LANDLORD AND TENANT, 18.
Motions and grounds for new trial, see NEW TRIAL.
Amendment of pleadings at trial, see PLEADING, 2.
Place of trial, see VENUE.
Instructions in action for flooding lands, see WATERS AND WATER COURSES, 5.
Competency and examination of witnesses, see WITNESSES.

Trial—Continued.

1. TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE. It is not error to reject cumulative evidence as to defendant's condition, especially where it referred to a time after the occurrence of the alleged offense. *State v. McDonald*..... 696
2. TRIAL (35)—OBJECTIONS—SCOPE AND SUFFICIENCY. An objection to letters as self-serving is unavailing where parts of the letters were proper and the objection was not confined to the objectionable parts. *Bayers v. Barry*..... 252
3. TRIAL (80)—INSTRUCTIONS—IN WRITING—NECESSITY. Rem. Code, § 339, requiring instructions to be given in writing is not applicable to ordinary admonitions, such as a statement that the jury has nothing to do with the punishment if accused is found guilty. *State v. Jensen*..... 401
4. SAME (101) — INSTRUCTIONS — ALREADY GIVEN. Error cannot be predicated upon the refusal of a requested instruction which was sufficiently covered in the general charge. *Bayers v. Barry*..... 252
5. TRIAL (101) — INSTRUCTIONS — REQUESTS—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse a requested instruction to the effect that a boy must use such care as a person of his capacity, age and experience could ordinarily use, where it was sufficiently covered by instructions defining contributory negligence, dependent upon his experience and age, and the care exercised by an ordinarily reasonable and prudent person under the circumstances. *Hutchins v. School District No. 81 of Spokane County*..... 548
6. TRIAL (102) — INSTRUCTIONS — REQUESTS—PARTLY ERRONEOUS. It is not error to refuse a requested instruction which was in part bad, although parts of it could have been properly given. *Bayers v. Barry*..... 252

Trusts:

Judgment against trustee as concluding *cestui que trust*, see JUDGMENT, 6.

Creation by will, see WILLS, 2.

1. TRUSTS (13, 19) — RESULTING TRUSTS — CREATION AND EXISTENCE—EVIDENCE—SUFFICIENCY. A resulting trust in mortgaged land is not created in favor of one who advanced part of the money to redeem from a foreclosure sale, whereby the land was restored to the mortgagor; since the mortgage was a lien only, leaving title at all times in the mortgagor, and a resulting trust does not arise in favor of one who voluntarily discharges a lien. *Cochran v. Cochran*..... 499

Unlawful Detainer:

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT, 10-18.

Compliance with judgment as cessation of controversy on appeal, see APPEAL AND ERROR, 1.

Deposits in court as rent due, rights of parties, see DEPOSITS IN COURT.

Vacation:

Sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 6.

Value:

Of party wall as determining damages for property taken, see EMINENT DOMAIN, 3.

Of property set aside to widow, evidence of, see EXECUTORS AND ADMINISTRATORS, 4, 5.

Of ground rent, see LANDLORD AND TENANT, 7, 8.

Of property received in trade, evidence of, see VENDOR AND PURCHASER, 3.

Vendor and Purchaser:

Rescission of contract by purchaser for fraud, see CANCELLATION OF INSTRUMENTS, 1.

Sale of property of decedents under order of court, see EXECUTORS AND ADMINISTRATORS, 6, 7.

Sale of state lands, see PUBLIC LANDS.

Transfer of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Sales by executors, see WILLS, 2.

1. VENDOR AND PURCHASER (3)—CONTRACT—CONSTRUCTION. A note at the foot of a contract for the trade of lands requiring delivery of possession and marketable title does not impose any burden other than the law would require. *Le Marinel v. Bach*..... 651

2. SAME (10)—CONTRACT—VALIDITY—FORM—PARTIES. Informalities in referring to the parties to a trade as "you" and "our," do not invalidate a contract for a trade, where the names of the parties clearly appear in their signatures, making and accepting the proposition. *Le Marinel v. Bach*..... 651

3. SAME (18) — EVIDENCE OF DAMAGE — SUFFICIENCY. On a trade of property, the value of thirty acres received by plaintiff is a question for the jury, where witnesses on one side testified it was worth $125 per acre, and on the other side that it was poor land and not worth over $50. *Cramer v. Clark*..... 126

4. VENDOR AND PURCHASER (30, 107) — CONSTRUCTION OF CONTRACT — PROVISION FOR PAYMENT OF TAXES. A contract for the sale of land providing that the "taxes, rents, insurance . . . shall be apportioned from date of deed," refers to taxes for the year in which the contract was made; and Rem. Code, § 9235, providing for a lien for unpaid taxes, as between grantor and grantee, in the absence of an agreement as to who shall pay the same, has no application. *Carstens v. Powles & Co*..... 588

5. SAME (73) — RESCISSION OF CONTRACT — ACTIONS — EVIDENCE—ADMISSIBILITY. In an action to rescind a contract for the sale of land and certain water rights, in which the defendants admit an in-

Vendor and Purchaser—Continued.

ability to convey the water rights, the question of fraud in the making of the contract is immaterial. *French v. C. D. & E. Investment Co*..... 416

6. SAME (74) — RESCISSION OF CONTRACT—ACTIONS—NATURE AND EXTENT OF RELIEF. In an action to rescind a sale of land, in which the purchaser sought recovery of the purchase price and tendered a reconveyance, but failed to keep the tender good by bringing the deed into court, judgment for the plaintiff should provide for a reconveyance of the property. *French v. C. D. & E. Investment Co.* 416

7. VENDOR AND PURCHASER (88-93) — PERFORMANCE OF CONTRACT — DEPENDENT COVENANTS. Under a contract for the sale of arid land together with certain water rights, the land and water were dependent one upon the other, and the contract cannot be fully performed as to one part without the other. *French v. C. D. & E. Investment Co.* 416

8. SAME (159-173)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—PARTIES LIABLE. Where, after making a contract for the sale of land, the corporation changed its name, and a new company of the old name was formed, taking over part of the old assets, and received all the payments made by plaintiff, turning them over to the old company, all without the knowledge of the plaintiff, both companies are properly held liable to plaintiff on rescission of the contract. *French v. C. D. & E. Investment Co*..... 416

9. VENDOR AND PURCHASER (174) — REMEDIES OF PURCHASER — RIGHT OF ACTION—BREACH OF CONTRACT. Where defendants agreed to cause to be conveyed to plaintiff, in a trade, property of the value of six thousand dollars, they are liable for breach of the contract, and it is immaterial whether they made any specific representations as to the property. *Cramer v. Clark*..... 126

10. SAME (186)—REMEDIES OF PURCHASER—DAMAGES—MEASURE—DIFFERENCE BETWEEN LAND AS REPRESENTED AND ACTUAL VALUE. Where defendants agreed to cause to be conveyed to plaintiff, in a trade, property of the value of six thousand dollars, and conveyed property of little value, the measure of damages is the difference between the value of the property transferred at the time of the sale, and what its value would have been if as represented. *Cramer v. Clark* 126

Venue:

Criminal prosecution, see CRIMINAL LAW, 2, 3.

1. VENUE (18) — CHANGE OF JUDGES — RIGHT TO. The change of venue statute is applicable to a proceeding against a father under the juvenile court act to have a child adjudged a dependent child. *State ex rel. Davis v. Superior Court*..... 335

Venue—Continued.

2. SAME (20) — CHANGE OF JUDGES — TIME FOR APPLICATION. After counsel appears before the court and requests a judge to continue a hearing for the convenience of counsel, which was granted, it is too late to seek a change of judges under Rem. Code, §§ 209-1 and 209-2, requiring the application to be made at the time of appearing and before the court has made any ruling in the case. *State ex rel. Davis v. Superior Court* 335

Verdict:

Inadequate or excessive damages, see DAMAGES, 6-8.
Judgment notwithstanding verdict, see JUDGMENT, 1, 3.
Setting aside for insufficiency of evidence, see NEW TRIAL, 1.

Vice Principals:

See MASTER AND SERVANT, 6.

View:

By jury, see CRIMINAL LAW, 7.

Waiver:

Of right to allege error, see APPEAL AND ERROR, 2.
Breach of contract, see CONTRACTS, 6.
Of forfeiture of lease by acceptance of rent, see LANDLORD AND TENANT, 9.
Of demurrer, see PLEADING, 1.
Of vendor's lien, see SALES, 6.

Wards:

See GUARDIAN AND WARD.

Warehousemen:

1. WAREHOUSEMEN (7)—INJURY TO GOODS—DETERIORATION OF MEAT—EVIDENCE—ADMISSIBILITY. Upon an issue as to the tainted and unfit condition of meat held in cold storage by defendant, it is admissible to show its unfit condition although still frozen in the center after being transported some distance in express and not refrigerator cars, the weight of such evidence being for the jury. *Worthy v. Arctic Co.* 435

2. SAME (7)—SUFFICIENCY. Whether a warehouse properly cared for cold storage meat is a question for the jury, where there was evidence as to its unfit condition when it was examined and tested as it was found in the warehouse. *Worthy v. Arctic Co.* 435

Warranty:

On sale of goods, see SALES, 5.

Waters and Water Courses:

Liability of county for flooding land in doing road work, see COUNTIES, 2.

Measure of damages for flooding land, see DAMAGES, 5.

1. WATERS AND WATER COURSES (56) — SURFACE WATERS — DRAINAGE OR DISCHARGE — LIABILITY. A county is liable for damages caused by flooding land where, in order to protect a road from surface waters, it dug an artificial ditch conveying and depositing waters on land that naturally would not receive them. *Whiteside v. Benton County* 463

2. WATERS AND WATER COURSES (65) — CONVEYANCES — RIGHTS APPURTENANT TO LAND. Where a vendor contracted to give a deed of land "together with a perpetual water right appurtenant to and laid in the S. canal," fixing a separate price for the water rights, a deed of the lands alone does not pass the water rights as an appurtenance. *French v. C. D. & E. Investment Co*..... 416

3. WATERS AND WATER COURSES—FLOWAGE—INJURIES FROM CONSTRUCTION OF DITCH — EVIDENCE — SUFFICIENCY. An irrigation district impounding and conveying water is bound to exercise only ordinary care in the construction of ditches, and an owner of land lying below the ditch cannot recover damages caused by overflowing the land through seepage without showing that the ditch was negligently constructed; and in the absence of evidence, negligence will not be presumed. *Longmire v. Yelm Irrigation District*..... 619

4. SAME (72) — FLOWAGE — ACTIONS — QUESTION FOR JURY. Whether flowage from a reservoir resulting in damage to land was due to defendant's negligence, or an unprecedented rainfall, is a question for the jury, when the evidence on the question as a whole was in conflict. *Caldbick v. Marysville Water & Power Co*..... 562

5. WATERS AND WATER COURSES (73, 74)—FLOWAGE—ISSUES—INSTRUCTIONS. Upon an issue as to damages to land from flooding resulting in a decrease of the market value of the property, instructions are properly refused, when based upon whether the material washed upon the property by the flood was a benefit or damage to the land. *Caldbick v. Marysville Water & Power Co*..... 562

Welfare:

As incident to custody of child, see PARENT AND CHILD.

Wills:

Effect of intestacy, see DESCENT AND DISTRIBUTION.

Powers and jurisdiction of court under nonintervention will, see EXECUTORS AND ADMINISTRATORS, 7.

Legacy and succession taxes, see TAXATION.

Competency of party in interest to testify to mental capacity of deceased, see WITNESSES, 1.

Wills—Continued.

1. WILLS (7) — TESTAMENTARY CAPACITY — EVIDENCE — WEIGHT AND SUFFICIENCY. Mental capacity to execute a will is sufficiently shown by evidence that decedent, though affected with softening of the brain and subject to intervals of incompetency, was, in the opinion of experts and others, competent at the time the will was executed. *In re Anderson's Estate* 591

2. WILLS (75) — CONSTRUCTION — ESTATES IN TRUST — POWER OF DISTRIBUTION—LIMITATION AS TO TIME—EFFECT. Failure of executors to sell property within the five years fixed in a will will not terminate the trust, where the property was devised in trust for named devisees, and the necessity for making the sale continues. *In re Abrams' Estate* 51

Witnesses:

Objections to cross-examination, for purpose of review, see APPEAL AND ERROR, 7.

Compelling state to call witnesses, see CRIMINAL LAW, 8.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 15-19.

Opinions of experts, see EVIDENCE, 5.

1. WITNESSES (44)—TESTIMONY OF TRANSACTION WITH PERSONS DECEASED—SUBJECT-MATTER—CAPACITY TO EXECUTE WILL. Rem. Code, § 1211, excluding evidence of transactions with a person since deceased by parties in interest, is not applicable to a will contest upon the issue as to the mental capacity of deceased to execute the will. *In re Anderson's Estate* 591

2. WITNESSES (72) — CROSS-EXAMINATION — DISCRETION. Upon an issue as to the value of the services of an attorney, cross-examination as to the extent of his business and experience is within the discretion of the court, and it is not error to limit the same as to specific matters after it was covered by a general inquiry. *Levine v. Barry* 623

3. SAME (72, 79, 85)—CROSS-EXAMINATION—DISCRETION—LIMITATIONS —ASSUMING FACTS—HYPOTHETICAL QUESTIONS. Upon an issue as to the value of the services of an attorney, hypothetical questions to experts must be based upon the testimony in the case, but cross-examination should not be so limited and may be based upon the party's theory of conjectural facts, and the matter does not rest in the discretion of the court. *Levine v. Barry* 623

4. WITNESSES (72, 79, 85) — CROSS-EXAMINATION—DISCRETION—LIMITATION—HYPOTHETICAL QUESTIONS. Where an expert has testified on direct examination that seven and one-half per cent of the cost was reasonable compensation for engineering services, it is error to exclude, on cross-examination, an answer to a hypothetical question

Witnesses—Continued.

which went into the details of the services performed under the contract; it not being discretionary to so limit the cross-examination. *Le Doux v. Seattle North Pacific Shipbuilding Co*..... 632

5. WITNESSES (78)—CROSS-EXAMINATION—LIMITATION TO SUBJECT OF DIRECT EXAMINATION. Where one of the plaintiffs had testified on direct examination as to their ownership of land, cross-examination as to whether the property had not been sold under contract and as to price received therefor, is improper as not relating to the matter testified to on direct examination. *Caldbick v. Marysville Water & Power Co.*..... 562

6. WITNESSES (103)—IMPEACHMENT—CHARACTER OF WITNESS—HABITS —IMMORALITY. The prosecuting witness in a prosecution for sodomy cannot be impeached by proof of immoral habits or individual acts of immorality. *State v. Demas*..... 596

7. WITNESSES (114) — IMPEACHMENT—STATEMENTS CONTRADICTED. A witness testifying as to the ownership of an automobile may properly be impeached by the admission of a bill of sale of the car. *State v. McDonald*..... 696

8. WITNESSES (126-1) — IMPEACHMENT — IRRELEVANT OR COLLATERAL MATTERS. In a prosecution for arson in the burning of a building by accused for the purpose of collecting the insurance, in which witnesses testified to a conversation in which accused proposed to burn the building, stating that he had had a fire at S. and had collected the insurance, after some difficulty, it is not error, after allowing accused to deny the conversation, to refuse to allow accused to explain the circumstances concerning the other fire; since that involved an issue foreign to the case. *State v. Wilcox*..... 14

Woods and Forests:

Cutting and sale of timber, see LOGS AND LOGGING.

Workmen's Compensation Act:

Awards for permanent partial disability, see MASTER AND SERVANT, 2, 3.

Writings:

Parol evidence to vary writings, see EVIDENCE, 3, 4.
Necessity for written instructions, see TRIAL, 3.

Writs:

See HABEAS CORPUS.

Year:

Estates for years, see LANDLORD AND TENANT, 2.